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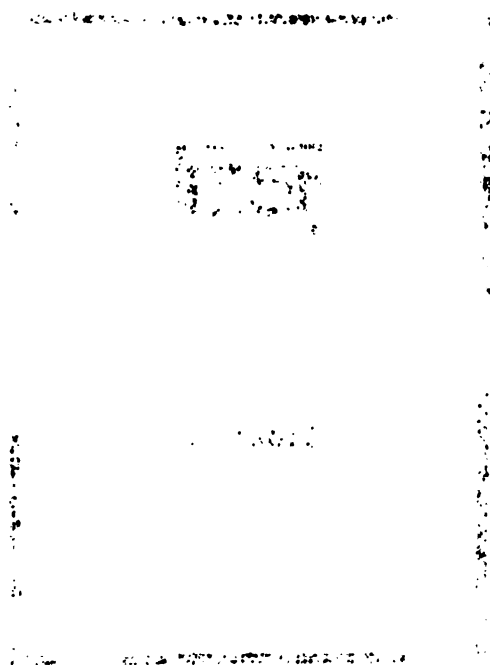
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REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

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AT ATLANTA.

Parts of July Term, 1873, and of January Term, 1874.

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NOTE.

By Act of 1866, (section 4270 of the Code) the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Judges McCAY and TRIPPE, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head notes being made by the Reporter. All other head-notes by the Reporter are designated by (R.)

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CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Georgia,
AT ATLANTA,

JULY TERM, 1873.

PRESENT—HIRAM WARNER, CHIEF JUSTICE,
H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

MOULTRIE MOSES *et al.*, plaintiffs in error, *vs.* ISAAC I.
MOSES, executor, defendant in error.

1. When a portion of the assets of an estate consists of an interest in a partnership of which the deceased was a member, it is the duty of an executor who knows the fact, to take notice of the claim in his inventory and return it to the Ordinary, but a failure to do this, though an act justifying suspicion, does not require the executor to be charged with the nominal value of such interest, and he may show what was its real value.
2. When, within a reasonable time after qualification, the executor has a settlement with a surviving partner of the deceased, and receives from him, as the deceased's interest, part of the assets of the partnership in kind, such settlement is to be considered *prima facie*, as a fair one, and if there be no affirmative evidence to the contrary, a jury is authorized to act upon it, as a just and proper settlement.
3. When an executor buys from a surviving partner of the deceased, an interest in the partnership, giving his own note, and subsequently takes from the surviving partner that note as part of the deceased's share in the partnership, and substitutes in his hands, as executor, for that

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note, other good and well secured notes belonging to himself an investment of the money for the estate. Such acts are not illegal, though they justify and require a close scrutiny into the good faith and *bona fides* of the transaction.

4. When the assets of an estate came into the hands of an executor in October, 1860, and were mostly in promissory notes, and the legatees were most of them citizens of New York, and the executor made no returns to the Ordinary during the war, but managed their own affairs in this State, keeping books and making entries therein of his transactions, and in 1865 made a full return of his acts to the Ordinary, and procured from him a special order, excusing his failure to make returns during the war, and allowing him his commissions :

Held, That a verdict of a jury is not illegal, which recognizes the executor as not in default for failing to make returns during the war, and which excuses him for losses upon investments made in good faith, and under circumstances, such as other prudent men acted in the same way.

5. Until the adoption of the Code, 1st of January, 1873, there was no particular funds or bonds in which trustees were required by law to invest, and investments made as other prudent men invested their funds, if made in good faith, will protect an executor if he be guilty of no illegality.
6. It is not improper for a jury to allow an executor reasonable counsel fees for advice and aid in the management of an estate, and making returns. But when the legatees file a bill against the executor for an account, charging a *devastavit*, it is improper and illegal to allow the executor counsel fees for defending the bill, unless it plainly appear that there are such complications and conflicting claims among those interested in the estate as to make it necessary for the interest of the parties, that the settlement should be by a decree of the Court.

Administrators and executors. Partnership. Settlement. Returns. Investments. Attorney's fees. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

This bill is filed by Moultrie Moses, Montefiore Moses, Flora Moses and her husband Otto L. Moses, Sarah Davega and her husband, Isaac Davega, and Felix T. Moses and Jacob Moses, minors, who sue by their next friend, Moultrie Moses, against Isaac I. Moses, executor of Jacob I. Moses, deceased.

It is charged that Jacob I. Moses died, leaving a large estate of real and personal property, and a will and codicil, by which he disposed of the same. Under this will, legacies were be-

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queathed to the said Sarah, who was the widow of said Jacob I., and divers other persons. It also gave to Moultrie and Montefiore, and their brother, Rynear, a legacy of \$20,000 00, and provided the same should be placed in the hands of three respectable and responsible gentlemen of New York, in trust, to be invested in the best six per cent. securities until Montefiore arrived at twenty-one, when it should be divided into three equal parts, one to be given to Montefiore, and the balance to be kept until Moultrie arrived at twenty-one, when he should have half, and the balance to be kept until Rynear became twenty-one.

The balance of the estate might be continued in business by his executors as long as it might be considered perfectly safe to do so, for terms of three years, and should pay an interest of seven per cent. clear profit, payable monthly. Of this interest he gave his wife, for her own and the support of the said Flora and such other children as might be born, \$100 00 per month, and for the support of his three sons, \$75 00 per month. The codicil raised the amount to his wife \$50 00 per month, and to his sons \$25 00 per month, making, in all, a monthly sum of \$250 00.

The residue of the interest and profits to be invested as fast as received for accumulation, and so with any part which may be withdrawn from business until January 1, 1870, when the whole of that part was to be divided between all his children equally. To this will his wife, Sarah, was appointed executrix, and his brother Isaac and brother-in-law, A. J. Brady, and friend, Hervey Hall, and his three sons, as they became twenty-one, executors.

The testator died in 1854, and his estate consisted of real estate, \$200,000 00; one-half interest in mercantile house of Hall & Moses, at Columbus, and Hall, Moses & Roberts, at Montgomery, the assets of which were of the value of \$300,000 00 over and above liabilities; also, real estate in Georgia, \$100,000 00, and personal property and cash, \$50,000 00.

The will was proven, and said Isaac I. qualified and took the burden of administering the estate. It is charged that he

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received all the estate, and after paying all the debts, there was \$250,000 00 in his hands to be paid the legatees; that the said Isaac continued said mercantile business for years and received large profits; that he sold divers parcels of real estate; that the interest of said testator, when withdrawn from business, was worth \$100,000 00; that the executor made no return, but managed the estate as his own, and has made large profits by trade and speculation; that the executor has not paid over the \$20,000 00 to any persons to hold, as directed by the will, but has kept it in his own hands and used it as his own; that, in settling up the Montgomery interest with Hervey Hall, the surviving partner of Hall & Moses, the said executor himself became the purchaser of said interest, and gave his notes to Hall for \$30,000 00 in payment, and afterwards received his said notes from Hall in settlement of the portion of his testator in the concern at Montgomery; that said executor thereby became indebted to the estate in the amount of said notes; that, afterwards, he sold, or pretended to sell, the interest so obtained by him to Wyman, Moses & Company, for a large profit, to-wit: \$20,000 00, and received in payment the notes of said purchasers.

That the executor pretended that an amount of said notes received from Wyman, Moses & Company equal to the amount of his own notes received by him from Hervey Hall, were the property of the estate, but that the balance of the notes of Wyman, Moses & Company were his own property, and having thus disposed of the interest of his testator in the Montgomery concern, he pretended, during the late war, that the estate was in great danger of losing the claim on Wyman, Moses & Company, and in order to save it, it was necessary to receive Confederate money in payment, although the claim existed before the war. But the executor did not receive such money in payment from said Wyman, Moses & Company of the notes belonging to him, and held them after the war. So complainants say the interest of the testator in the Montgomery concern was lost to the estate by the mismanage-

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ment and illegal actings and doings of defendant, and that he ought to account for the value of the same.

The claimants pray for a discovery and account. Montefiore and Moultrie claim each one-third of the \$20,000 00, and each claim one-sixth of the residue of the estate.

The defendant answered, giving an account of each item of the assets which came to his hand, substantially, as follows:

The estate consisted of a house and lot, with furniture, in New York, and also several unimproved lots in New York. The balance of the estate consisted of the one-half interest in the firm of Hall & Moses of Columbus. The house and lot was given by the will to the wife and children during life, and the furniture to wife and children. The unimproved lots had not been disposed of but were turned over to the heirs and they have sold and divided them amongst themselves, leaving a small balance of \$511 66 of personal property in New York, in the hands of the executor, which he has administered in New York.

The assets of Hall & Moses consisted of the stock in trade, and notes and accounts in Columbus of the value of \$106,-264 15, which includes the assets of Jacob I. Moses & Company; one-half interest in the firm of Hall, Moses & Roberts, in Montgomery, of the value of \$34,932 05; certain real estate in Girard and Columbus. At the death of Jacob I. Moses, Mr. Hall, as surviving partner of the firm of Hall & Moses, took charge of the assets of Hall & Moses, including the real estate and interest in Montgomery, and retained and managed the same until the division which was made in January, 1860.

The share of Jacob I. Moses was not continued in business, not only because the executor did not think proper to do so, but Mr. Hall positively refused to allow it to be done, and the firm was dissolved by the death of said Jacob I. On the 1st of January, 1855, a balance sheet was struck which shows the assets, of every kind, belonging to Hall & Moses, and the nominal value of these assets, giving the cost of property purchased by the firm, and the amount due on the notes and ac-

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counts due the firm, and the amount of capital invested in the firm of Hall, Moses & Roberts. A copy of this balance sheet is set out, which is correct. The nominal value of the assets is \$208,515 94.

After deducting the capital in Hall, Moses & Roberts, and the real and personal property, which is otherwise accounted for, the individual accounts of the partners, the expense account, charges account and some bank bills, which were worthless, there remained of available assets for division, supposing every dollar due the firm was collected without expense, \$136,823 21, one-half of which belonged to Jacob I. Moses.

The stock of goods was sold by the survivor to a new firm, consisting of the said Hall, William A. Beach, Jacob P. Hendricks and the defendant. The amount it sold for was \$66,762 90, and this was its value. It was understood between Mr. Hall, as survivor, and defendant, that it should be the special business of defendant to settle up the affairs of Hall & Moses, and bring them to such a condition that a division could be made of the assets.

The debts due by Hall & Moses amounted to \$93,491 82. The amount due the firm upon open accounts, \$87,501 57, and by note, nearly \$70,000 00. These notes and accounts were the accumulations of many years' business, and were due, perhaps, by three thousand different persons, in various amounts, scattered over portions of Georgia and Alabama.

It required great labor and vigilance to pay off the debts and collect the notes and accounts, and it was not until 1860 that defendant could get the assets in a condition to be divided. On the 1st of October, 1860, a settlement was had with H. Hall, as survivor, and defendant then took charge of the half interest belonging to Jacob I. Moses, except the real estate, which was held in common.

Previous to this division, defendant had none of the assets of Hall & Moses in his hands as executor, and all payments of legacies and debts made by defendant, as executor, in New York, and by A. J. Brady, who first qualified in Georgia,

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were made through H. Hall, survivor, and charged against the interest of Jacob I. Moses.

The amounts so paid by Brady and defendant, as executors, were included in the settlement with Mr. Hall.

This defendant, as executor, in New York, has made returns to the Surrogate, and has fully accounted for all that came into his hands as such.

Defendant gives a statement of the amount of the assets received from H. Hall, survivor, which does not include the real estate, but does include the rents up to the settlement, as follows :

The account of Jacob I. Moses, on books of Hall & Moses..	\$ 6,998 12
Amount paid A. J. Brady, executor.....	24,271 71
Amount paid Isaac I. Moses, executor in New York.....	11,603 72
Sundry notes, of which the names of parties and amounts are given.....	49,806 40
Note of Isaac I. Moses.....	30,000 00
Deposit in Bank of Columbus, to purchase stock and stock in bank.....	5,086 25
Gas light stock.....	1,200 00
Cash, September 1, 1860	856 95
Making the whole amount.....	\$128,918 15

This amount, however, is \$888 90 more than the share of Jacob I. Moses, upon a calculation of the interest due on the notes taken in the settlement, so that the actual amount received on the share of said Jacob I., exclusive of the real estate, is \$128,029 25.

The real estate is set out and described, except a few small parcels sold by H. Hall, survivor, and included in the settlement. The value of the real estate, as set out in the balance sheet, except some lots in Girard, not valued, is \$12,912 28. Certain other real and personal estate and stock, contained in said balance sheet of Hall & Moses, amounting to \$6,712 87, a list of which is not set out, was sold by H. Hall, survivor, (except two negroes, one of whom died and the other was set free by the will,) and is included in the settlement.

The answer then goes on to explain and follow up each item of property received and to account for the same.

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The whole amount of notes collected in Confederate money (except from the Montgomery concern, which is specially accounted for,) is \$6,402 10. As to the note of Isaac I. Moses for \$30,000 00, the defendant says: Hall & Moses formed a partnership with J. W. Roberts, in Montgomery, under the name of Hall, Moses & Roberts. Hall & Moses furnished the capital, which was \$30,000 00, and Roberts was to attend to the business, and the profits to be equally divided between Hall and Moses and Roberts. This partnership had not been profitable, nothing having been received by Hall & Moses. On the 1st of January, 1855, a balance sheet was made, showing the nominal amount of the assets \$116,245 95, and the liabilities \$50,916 19, leaving the capital \$65,328 76. Hall & Moses had drawn nothing, whilst Roberts had drawn all his expenses, and had thus nearly received all his share of the profits.

After the death of Jacob I. Moses, and after this balance sheet was made out, Mr. Hall, as survivor, made the following agreement with Roberts: It was agreed that the share of profits to which Hall & Moses were entitled was \$30,000 00, which, added to the capital furnished by them, would make their interest in the concern \$60,000 00, and proper entries were made on the books of Hall, Moses & Roberts.

It was the desire of Mr. Hall and defendant to realize as much as possible from this interest, and for that purpose, he bought one-half interest of H. Hall, survivor, in the firm of Hall, Moses & Roberts, at the price of \$30,000 00.

This sum was fixed because it was the amount of the interest of Jacob I. Moses, and it was the intention of both Mr. Hall and defendant that the half thus purchased was the half belonging to the said Jacob I. The true value of this interest was not \$30,000 00, and was not more than \$17,000, and it would not have brought more than that sum in the market if sold. This defendant hoped, by good management, that he could realize \$30,000 after extricating the firm from its then embarrassed condition, and he desired that the estate of Jacob I. should reap the benefits of his efforts. Accordingly

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he took this interest from Mr. Hall at said price with the understanding that this amount was to remain at interest until it became convenient to pay it. This defendant was not at the time able to pay it, nor was he even worth the amount. From the date of this transaction the new firm of Hall, Moses & Roberts paid to Hall & Moses the interest upon this sum, which Mr. Hall accounted for in the settlement.

In April, 1859, after having succeeded in placing the firm upon a good basis, Mr. Hall and defendant determined to sell out the entire interest in this firm to Wyman, Moses & Company. This last firm consisted of a brother of defendant, one Wyman and Mr. Roberts, defendant having no interest in it directly or indirectly.

The terms of sale were, that Wyman, Moses & Company gave their notes to defendant for \$40,000 00 in notes of \$1,656 25 each, payable in New York every ninety days from July, 1859, which includes interest from July, 1859, to the time the notes became due. These notes were secured by mortgage upon the stock and also upon real estate worth more than the amount of the notes. In the settlement with Mr. Hall, the defendant received the note for \$30,000 00 given by him, as before stated, as the share of Jacob I. Moses in the firm of Hall, Moses & Roberts, but Mr. Hall still held this note at the time of sale to Wyman, Moses & Company. As soon as this settlement was made this defendant determined to substitute an equal amount of the notes of Wyman, Moses & Company for this \$30,000, and he did, in October, 1860, transfer to himself, as executor, enough of the notes of Wyman, Moses & Company which first came due as would make the amount. Some of these notes had then been paid to Hall & Moses, and he took the note of Hall, Moses & Company for the amount paid, to-wit: \$4,711 89, in lieu of the money.

In 1862, the city of Montgomery was threatened, and this defendant feared, would be attacked by the army and navy of the United States. Supposing a capture of the city would greatly endanger the debt due by Wyman, Moses & Company, the defendant thought it prudent to collect it in Confederate

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money rather than risk the chances of collection after the war in current funds. At that time Confederate bonds of a certain kind were being readily sold in England for eighty cents on the dollar in gold, and it was the purpose of defendant to obtain such bonds and send them to England for sale. He arranged with Wyman, Moses & Company to receive such bonds in payment of their notes. Finding that they could obtain bonds of the Alabama and Florida Railroad Company he proposed to receive \$4,000 00 in them, and did receive them. This company was then solvent, but the results of the war left them insolvent. Wyman, Moses & Company paid \$25,000 in such Confederate bonds, which, with the \$4,000, paid off the notes held by defendant, as executor. After receiving them he made diligent efforts to get the bonds to England, but was not able to do so. He then determined to convert as many of them as possible into other securities, and finding an opportunity to do so he exchanged \$10,000 00 for notes on individuals made before the war, and all perfectly good and solvent. In this whole matter he says he acted in the most perfect good faith, and as a prudent man would do in like circumstances. In proof of this, he says that Mr. Hall, who is a man of great prudence and business skill, pursued identically the same course in reference to his own interest in this firm, and lost the whole amount.

This defendant has realized from the Montgomery interest,	
in interest to 1859.....	\$10,408 00
Paid the legatees cash	16,921 00
	<u>\$27,329 00</u>

and has on hand \$12,000 00 in what were perfectly good assets, and \$10,000 00 in Confederate bonds.

In 1862, Montefiore J. Moses became twenty-one years of age and had qualified as executor. There was then due him as his one-third of the special legacy, \$11,378 19. The defendant turned over to him, as co-executor, assets amounting to \$21,378 19, which was \$10,000 00 more than his part of the legacy. The balance is a charge against his interest in the residue. Besides this, defendant paid him \$5,000 00 in Con-

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federate bonds, in June, 1863, and took his receipt. The said Montefiore J. has accounted for the same as such co-executor.

In 1865, when Moultrie came of age, he was entitled to \$11,939 00 as his part of said special legacy, and \$1,200 00 on account of monthly legacy. Defendant then turned over to him the bonds of R. J. Moses, which were part of the assets of the estate, amounting to \$16,280 00, and took his note for \$3,141 00 for balance which he claims as an offset and payment to him.

No returns were made by defendant until 1865. The reason why none were made was because, prior to the settlement in 1860, H. Hall held all the assets. In 1861, and before the time when by law he would have made a return, the war commenced, and, as all the legatees except two resided in the State of New York, he feared by making his return to call attention to the estate in his hands belonging to these non-residents and subject it to sequestration. But he did keep a full account on his books, and as soon as the war ended he caused a full return to be made embracing all the time from 1860.

Regular returns have been made since. Defendant advanced to Montefiore and Moultrie Moses large sums of money, to enable them to procure the necessities of life, from time to time. For this money he now holds against them as follows

AGAINST M. J. MOSES.

Note dated April, 1861, principal.....	\$ 86 00
Note dated June, 1861, principal.....	100 00
Note dated November, 1862, principal.....	100 00
Receipt October, 1864, principal.....	8,000 00
Receipt October, 1864, principal.....	500 00
Account in 1864.....	7,860 00
	<hr/>
	\$11,646 00

AGAINST MOULTRIE.

Account for 1864 for.....	\$4,750 00
Note dated November 13, 1860.....	100 00
Draft, favor R. J. Moses.....	1,120 00
Receipt October, 1864.....	8,000 00
Due bill February, 1863.....	275 00
	<hr/>
	\$9,245 00

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These sums are all claims which he holds against them, and he claims the same as set-offs against them, and if, upon final trial, they or either of them should be found indebted to this defendant over and above their shares, he prays a decree against them for the balance.

The bill and answer were referred to a master to take an account and report what amount, if anything, was due from the executor to the complainants. At the hearing before the master, no testimony was introduced except the bill, the answer of defendant, the returns to the Ordinary, and the various vouchers and documents connected with the same. The master reported as follows :

1st. The testator died in December, 1854.

2d. The most of his estate consisted of his interest in the partnership effects of Hall & Moses.

3d. The firm was composed of Hervey Hall and Jacob I. Moses.

4th. Hall, as surviving partner, closed up the partnership business in the manner and at the time set forth in the answer, and no settlement was made until October 1, 1860.

5th. The amount received from Hall, survivor, was \$128,029 25, and this is accepted in the calculations as the proper amount with which to charge defendant.

6th. No errors are found as mere matters of calculation in the returns of defendant as executor.

7th. All the items of credit claimed by defendant are allowed him, except those specially stated in the account.

8th. The amount due the executor on the 24th of January, 1872, is \$512 81.

The following items charged to the estate by the executor, have been deducted by the master :

1st. Commissions allowed the executor by the Ordinary during the years in which he made no returns: \$4,873 64, and interest on the same from March 4, 1867, \$1,791 03; total, \$6,664 67.

2d. Counsel fees charged as paid for filing the bill, \$150 00.

3d. Charges the defendant with the amount of Confederate

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bonds on hand, amounting to \$10,000 00, but without interest.

4th. Charges the defendant with the sum of \$100 00 as having been paid to Bivins for making out accounts.

The total amounts charged by the master against the defendant is.....	\$16,914 67
Deduct balance due him.....	512 81

And he finds the executor to be due the estate in the sum of \$16,401 86

5th. The complainant contends that the defendant is now chargeable with the entire amount of the \$30,000 00, that being the interest in the firm of Hall, Moses & Roberts. The master refuses to charge him with the whole amount, but charges him with the \$10,000 00 of Confederate bonds, which investment was made a considerable time before he had any authority to make it.

6th. Allows the executor the charge of \$500 00 paid Peabody & Brannon for aiding in managing the estate.

7th. Allows the defendant the credits for the amounts turned over to M. J. Moses, co-executor.

8th. Finds that the executor is entitled to a set-off against Moultrie Moses of \$7,796 18.

9th. And against Montefiore Moses, \$2,886 41.

10th. And that the specific legacies due the complainants have been paid.

Both complainants and defendants filed objections to the report. Complainants' objections are as follows:

1st. They except to the report as being inaccurate in the statement that most of the estate consisted in the interest in the firm of Hall & Moses.

2d. They except to the statement that Hall, as survivor, closed up the business.

3d. They except to that part of the report which accepts \$128,029 25 as the basis, and claim that Hall was indebted to the estate in a much larger amount.

4th. They except because it rejects as a basis of its calcula-

tions the actual assets existing at the testator's death, as shown by the answer and exhibits.

5th. They except so far as it recognizes the so-called inventory in the returns made to the Ordinary in January, 1865, as being an inventory.

6th. They except so far as it recognizes all or any of the notes as set forth in the returns as the assets of the estate.

7th. They except so far as it expressly or impliedly exonerates the defendant from any losses resulting from his lawless management and investment.

8th. They except so far as it either expressly or impliedly allows credits to defendant for anything but debts, legacies and expenses of administration paid and supported by vouchers.

9th They except to the allowance of counsel fees to Peabody & Brannon.

10th. They except so far as it exonerates defendant from liability for the amounts turned over to any co-executor; complainants say that he still remains liable with such co-executor.

11th. They except so far as it expressly or impliedly frees defendant from interest for any portion of the time from the beginning of the year 1855 down to date.

Defendant excepts upon the following grounds:

1st. To the refusal of the master to allow the sum of \$4,-873 64 for commissions, and to the charge of said master against defendant of said sum and \$1,791 03 interest on same.

2d. To the refusal to allow as a credit the sum of \$150 paid for counsel fees for defending bill.

3d. To the charging of defendant with \$10,000 00 for Confederate bonds.

4th. To the refusal to allow extra compensation in closing up partnership business.

5th. To the refusal to allow as a credit the amount due by Moultrie Moses.

6th. To the refusal to allow defendant a reasonable sum for expenses in defending this bill.

At the trial term complainants filed an amendment to their

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bill, which is a replication to and a denial of the facts and conclusions of the answer, and charges that the true amount to be charged against defendant is the one-half of the nominal amount of the assets of Hall & Moses, without respect to the amount actually received by him in the settlement with H. Hall, and giving a calculation based upon this to show how much is due by defendant, which amount is claimed to be \$100,053 73, up to 1st July, 1872.

At the trial complainants offered in evidence a balance sheet bearing date April 29th, 1857, made out by defendant, and which was admitted to be a balance sheet of the firm of Hall & Moses at that time.

It was proved by John Peabody, who was introduced by complainant, that the service rendered by Peabody & Brannon to the defendant, was in preparing his returns as executor and in other matters pertaining to the management of the estate before bringing this suit, and were worth \$500 00, and that the services of counsel on the part of defendant in defending this bill were worth \$1,500 00, and \$300 would be a fair compensation for the master.

The master's report shows that defendant produced and proved before him an order of the Judge of the Superior Court, authorizing investments in Confederate bonds, but that the investments were made prior to the obtainment of the order. The complainants admit these facts and that the proof of them was before the jury. The following is a copy of the balance sheet:

Stock as per books.....	\$211,295 33	
Error.....	\$ 87 49	
Balance interest account.....	11,086 82	
Balance P. & L. account.....	18,296 48	
	<hr/>	
	\$29,400 79	
Less balance charges account.....	\$5,405 25	
Less balance merchandise account.....	1,896 59	
	<hr/>	
	6,801 84	22,598 95
		<hr/>
		\$238,890 28

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ASSETS.

Open accounts.....	\$ 8,426 16	
Sundry accounts.....	1,096 20	
E. G. Dawson settled	160 47	
Oliver & Clements.....	6 50	
St. Mary's Bank bills.....	276 25	
Expense account.....	4,087 09	
Bills receivable.....	17,026 58	
		\$ 26,727 25
Stocks.....	\$ 11,976 51	
Real and personal estate.	19,170 56	
Investments.....	21,896 02	
Cash on hand	2,847 80	
		55,890 39
H. Hall's account	\$104,928 85	
Jacob I. Moses' account.....	\$ 6,098 12	
Executor I. I. Moses.....	87,164 54	
A. J. Brady.....	4,272 77	
	47,580 48	
		152,459 28
		\$234,476 92
Less unpaid debts		582 64
		\$233,894 28

The remainder of the evidence is contained in the bill, answer, exhibits and master's report. The return showed a petition by Isaac I. Moses, executor, to the Ordinary, giving reasons for not making returns and asking for an allowance of commissions, and the order of the Ordinary, March 4, 1867, allowing \$4,873 64 for such commissions. The exceptions to the master's report were submitted to the jury. The Court charged:

1st. It admitted that the specific legacies were paid, and on that point there was no controversy. It was contended by complainant that the basis taken by the master in making his report was not correct.

2d. It was the duty of an executor of a deceased partner to make some kind of inventory of the interest of the deceased partner in the partnership, and the interest of the deceased would be his share after the payment of all the debts due by the partnership. The executor was not entitled to have pos-

session of the assets of the partnership, but to have an account from the survivor and payment from him of the amount found to be due upon final settlement of the partnership affairs. Under the will, the executor was invested with large discretion, and he might himself, with others, buy the interest of the deceased in the partnership, and if the interest thus bought by him was purchased in good faith, and at a fair price, then the transaction would be valid and binding on the estate. If the price of the interest of the deceased was fair and *bona fide*, as charged and as taken by the master as the basis of calculation, the jury might also take it as a basis, but if the sum was not fair, or if the transaction was not in good faith, then the jury might take such a basis as the proof showed was correct. It was contended that the executor was not entitled to charge commissions, because he had failed to make regular returns. He thereby forfeited his commissions, but he might apply to the Ordinary to set aside this forfeiture and allow them, and if he did so, and the Ordinary set aside the forfeiture and allowed them, such allowance was *prima facie* evidence that the commissions were properly allowed, but it was only presumptive, and it was for the jury, from the evidence, to determine whether the commissions should be allowed or rejected. Further, that an executor in a proper case would be entitled to have allowed him a reasonable amount for counsel fees. He is only allowed such in a proper case, and the amount to be allowed will depend upon the condition and circumstances attending each particular case. The jury will look to the evidence in this case and the circumstances attending the administration of it, and from these they will determine whether the defendant shall be allowed counsel fees, and if so, what amount, allowing only a reasonable sum.

3d. If one of the sons of deceased qualified as executor, and if the defendant, as executor, turned over to his co-executor assets or property belonging to the estate to be administered by him as such co-executor, and did so in good faith and without any reason to apprehend that it would be wasted or lost by such co-executor, the executor, so turning over the property,

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would be discharged from liability therefor; but if it was not done in good faith, or if it was wasted by his privity, then he would be liable for the loss or waste.

4th. Under the will, the executor had the right to withdraw the interest of the deceased in the Montgomery partnership for the purpose of investment, and he might withdraw it by a sale thereof to himself or to himself and others, if he took it at a fair price and in good faith and for the benefit of the estate; if he withdrew in this manner, he might afterwards change the investment into the notes of other parties, and might change them into Confederate bonds and notes on individuals, without a violation of duty, if he, in this transaction, acted in good faith, and if his conduct was such as would characterize a prudent man under similar circumstances. But if he did not act in good faith, or if his conduct in these matters was not characterized by prudence, if loss occurred, he must sustain the loss and not the estate.

5th. They should apply these principles of law and determine from the testimony, whether said defendant was indebted to said estate, and if so, how much, or whether the estate was indebted to him, if so, how much; and further, that they might say in the verdict what disposition should be made of the property in the hands of the executor unadministered, and whether any of the legatees, complainants, were indebted to the defendant, and if so, in what sum, and that if any of them were indebted to defendant they might decree that such sum be set off against any part of said estate which might be due or become due such legatee.

6th. It was admitted that there were six children of testator, five of whom were complainants. The Court charged the jury further, that if they should find that defendant was indebted to the estate, or had any property belonging to the estate unadministered, that the same should be divided into six equal parts, and one part thereof should be decreed to each of the five complainants, the children of testator, the shares aforesaid to be subject to the right of set-off as above set out in the charge.

Under this charge the jury rendered the following decree :

1st. We decree in favor of the defendant and against Mrs. Davega and her husband.

2d. We further find and decree that the defendant be allowed the credit of \$4,873 64 for his commissions as of March 7th, 1867.

3d. We further find and decree that said defendant be allowed, by a credit, the amount of \$10,000 00 for the Confederate bonds on hand.

4th. We further find and decree that the said defendant be allowed a credit for the \$150 00 paid Mr. Benning and Mr. Blandford as fees for defending this bill.

5th. We further find and decree that the said defendant be allowed, as a credit, the amount of \$5,000 00 turned over to Montefiore J. Moses, the co-executor.

6th. These credits being allowed, we find and decree in favor of defendant in the sum of \$512 81 as the amount due him as executor, 24th January, 1872.

7th. We further find and decree that the said defendant be allowed the amount of \$1,500 00 as counsel fees for defending this bill, which sum includes the credit of \$150 00 above allowed.

8th. We further find and decree that the property and effects in the hands of the defendant, as set forth in the master's report in this case, be sold by the defendant, and that he retain, out of the proceeds of said sale, the balance of amount of counsel fees allowed, to-wit: \$1,350 00, and also the amount of \$512 81 due him, and that the balance of the proceeds of said sale be divided into six equal portions.

9th. We further find and decree that each of the five complainants, to-wit: Montefiore, William Moultrie, Flora O'Houguier, formerly Flora Moses, Felix and Jacob Moses, minors, do receive one portion of said proceeds, and that the defendant do recover of Montefiore J. Moses the amount of \$2,186 41 to be set off against his share, and that defendant do recover of William Moultrie Moses \$7,796 18, to be set off against his share.

Complainants moved for a new trial on the following grounds:

1st. Because the jury have not returned a verdict on all and each of the exceptions to the master's report, *seriatim*, as required by law.

2d. Because the jury have not returned any verdict on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth exceptions.

3d. Because the verdict is wrong and contrary to law in finding against the tenth exception filed by complainants, and allowing defendant a credit of \$5,000 00 turned over to Montefiore J. Moses, co-executor.

4th. Because the verdict is wrong, and contrary to evidence and law and the principles of justice and equity in finding in favor of the defendant on the first exception filed by him, and allowing him the sum of \$4,873 64 for commissions, and also in finding in favor of defendant on the third exception filed by him, and allowing him a credit for the \$150 00 paid Mr. Benning and Mr. Blandford as fees for defending this bill, and also in finding in favor of defendant on the third exception filed by him, and allowing him, as a credit, the \$10,000 00 for the Confederate bonds, and also in finding in favor of defendant on the fifth exception filed by him, and in finding that he should recover of the complainant, William Moultrie Moses, the amount of \$7,796 18; and also in finding in favor of defendant on the sixth exception filed by him, and decreeing that he should be allowed the amount of \$1,500 00 for counsel fees; and also that he should retain the same out of the proceeds of the sale of the property in his hands.

5th. That the verdict is wrong and against law and evidence in allowing defendant \$512 81, to be retained by him.

6th. That the verdict is wrong and against evidence in decreeing that the defendant should recover of Montefiore J. Moses \$2,186 41.

7th. That the verdict and decree is wrong and against law and evidence, in directing the balance of the proceeds of the sale to be divided into six equal parts, one whereof to be paid

to each of the five complainants, because two of the complainants, to-wit: Montefiore and Moultrie, have received considerable payments, and Flora has received \$60 00, and the two minors nothing.

8th. Because the verdict, as a whole, is against evidence and the weight of evidence.

9th. Because the verdict, as a whole, is contrary to law and the principles of justice and equity.

10th. Because the Court erred in charging the jury against the third and fourth exception of complainants.

11th. Because the Court erred in the construction of the following clause of the will: "The residue of this interest and the profits accruing every three years from my business shall be invested as fast as received for accumulation, and so with any part or all of my estate, when withdrawn from my business, until January 1, 1870;" and in holding and charging the jury that said clause did not narrow or restrict the executor's discretion in making and changing investments, and that he had the same license and latitude of discretion in that regard as if said clause were not in the will.

12th. Because the Court erred in charging the jury that the executor was protected from responsibility for losses, if his alleged investments and changes of investments were such as an ordinarily prudent man might have made in his own business, and that there was nothing in the will or law to make the investments an exception to the rule.

13th. Because the Court erred in charging the jury that, although the defendant became the purchaser, individually, from the surviving partner, still, he was at liberty to exonerate himself from that debt by substituting other debts, stocks or property therefor.

14th. Because the Court erred in charging that the defendant was exonerated from liability as to that portion turned over to his co-executor.

15th. Because the Court erred in that part of the charge beginning with the words, "that, under the will, the executor

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was entrusted with a large discretion," and including "basis, as the proof showed was correct."

16th. Because the Court erred in charging that the order of the Ordinary setting aside the forfeiture of commissions was *prima facie* evidence that they were properly allowed.

17th. Because the Court erred in that portion of the charge beginning with, "that, under the will, the executor had the right to withdraw the interest in the Montgomery partnership," and including, "and if losses accrue, he must sustain the loss and not the estate."

18th. Also, to the direction to divide the remainder into six equal parts, and that one part thereof should be decreed to each of the five complainants, because it went on the assumption that equal payments had been made to the complainants, whereas, the contrary is true.

The motion was overruled, and the complainants excepted upon each of the grounds aforesaid.

A. H. CHAPPELL; M. J. CRAWFORD, for plaintiffs in error.

HENRY L. BENNING; PEABODY & BRANNON, for defendant.

McCAY, Judge.

1. It is, without question, the law that an executor or administrator should take some notice in his inventory of the interest of the deceased in any partnership of which he was a member. He cannot, it is true, in his inventory ordinarily do more than make an estimate, since the control of the assets, books, etc., is with the survivor. But it is his duty to mention, for the information of all concerned, that there is such an interest and give as definite a statement of its amount and nature as he can. If he fail to do this when he has the information, it is a mark of suspicion, and authorizes a keen and suspicious inquiry into his acts in the premises. But we do not see that this justifies us in assuming any arbitrary value

of the partnership assets. The balance sheet of a dissolved partnership, in which all assets are put down at their nominal value, and which is, in fact, but a summary of the books with no estimate even of the value of the stock, or debts owing, is a very unfair standard. It appears by the defendant's answer, that the stock on hand was sold for more than the balance sheet puts it, and no reasonable man who has the least experience of human affairs, can, for a moment, believe that such a lot of debts on three thousand persons could be collected without considerable losses and expenses. In justice to both sides, it is, in such cases, only fair to treat the balance sheet as a mere general guide. If there be a very marked and extraordinary discrepancy between that and the final settlement with the survivor, some explanation of the fact should appear, especially if the executor took no notice of the interest in his inventory.

2. We do not think the final settlement with the survivor was unreasonably delayed. Assets, such as are indicated in the balance sheet, with \$93,000 00 of debts due from the concern, might very well require till 1860 to be put in condition for an intelligent and definite *final settlement*. It is to be noted that, before this final settlement was had, the survivor had paid over to the executors large sums. What took place in 1860 was the adjustment of the relations between the survivor and executor and the division of the assets on hand in kind, and we do not think it at all an unreasonable delay. In truth, it is fair diligence to get such a mass of assets in condition for a settlement in such a space of time. The amount actually received by the executor is all that he is to be charged with. It is true, if there be assets that he ought to have received, he is chargeable for neglect in not getting them. But it is for the complainants to show the existence of such assets. The executor, in his answer, declares that, on a final settlement between himself and the survivor, he received so much. Is there any *proof* that he received more, or that he ought to have received more? It is complained that Mr. Hall was not charged with interest; but this does not appear. We have only the final result. The mode by which the con-

dition of the affairs of the firm and of the relation of the survivor and executor to it was arrived at, does not appear. It was the duty of the executor to see to it that the settlement was a fair one. If he neglected to insist on all the rights of the estate, that was a breach of his sworn duty. But to charge him with such a breach, the fact of such failure should appear. We do not think the discrepancy between the balance sheet and the \$128,000 00 actually received, is so great as to cast the burden of proof upon the executor.

3. We agree that there are various acts of the executor, in the management of these assets, that are suspicious and approach to the very verge of illegality. Were we sitting as arbitrators, or as a jury, to decide the questions between the parties, we are not prepared to say that we would have been satisfied with the *bona fides* of some of these manipulations; but as none of them were actually illegal, and as the good faith of the executor in each of them was a question for the jury, we cannot say the jury acted illegally in believing, from the evidence, in that good faith.

4. The legal title to the partnership assets was in the surviving partner. He had a right to sell, and the defendant a legal right to buy. The relation of each of them, as trustees, was, however, such as that their acts are to be closely scanned, and only to be sustained when they are clearly in good faith. So, as to the change of the notes. The defendant had a legal right to settle his own note. The change of it for the other notes, it was the duty of the jury to scan closely and to judge suspiciously. But if it was, in truth, fairly done, and, at the time, it was a prudent act for the estate, it was not *illegal*. So, also, of the investment in Confederate bonds. It would be very harsh to hold a man, situated as was the defendant, to any other rule than that indicated by the Judge in his charge, to-wit: the skill and prudence of prudent men in the same situation. It was impossible to get the funds to New York for investment, and the executor was driven to invest them here as prudently as possible. It appears that he kept regular books during the war of each of these transactions. These

books were open to inspection. The whole investigation was upon the answer of the defendant, and we do not think the verdict of the jury is chargeable with prejudice or mistake in recognizing the good faith and honesty of the whole. If the acts of an executor are *illegal*, his good faith will not protect him, but if he keep within the bounds of legality, his liability is a question of good faith, to be decided by the jury.

5. Previously to the Code, 1st January, 1863, we had no rule in this State requiring trustees to select any particular mode of investing funds in their hands. It was their duty to invest them safely, prudently; each case stood upon its own facts. For this reason we think the investment in Confederate bonds, approved as it was by Judge Worrill, was not *illegal*; that, too, was a question of *bona fides* and turned upon whether it was apparently a prudent investment at the time.

6. As we have said, we do not intend, by our judgment, to express our approval of the acts of the executor, nor to say that we, if we had original jurisdiction, would have done as this jury has. But under our opinions of the nature of our jurisdiction we do not think this verdict is an abuse of the powers of the jury over the facts. We recognize the right of the defendant to be allowed counsel fees for advice and assistance in his management of the estate, and we see no objection, even on a bill for accounts, if the rights of the complainants are complicated and conflicting so as to require the judgment of the Court to protect the trustee to allow fees. But there is nothing of that here. It was a simple question of account—a charge of *devastavit*—and there is no more propriety in charging the plaintiffs with the counsel fees of the defendant than in any other suit in which the plaintiff fails. It would, we think, be a bad policy to put such an hindrance in the way of heirs or legatees seeking their rights, that they shall pay for counsel to aid the executor in resisting their charge of a *devastavit*. But we will not grant a new trial on this ground. We shall simply direct the Court to put the defendant on

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terms. He must consent to give up this credit, or the verdict must be set aside.

Judgment affirmed on terms.

NEWTON J. WHEELER, plaintiff in error, vs. JAMES STEELE, defendant in error.

1. Complainant charges in his bill, that the defendant has erected a dam across a stream, which causes the water to overflow complainant's land lying on the stream above this dam; that he has, at law, recovered nominal damages for the injury thereby done, and has other suits pending for the same wrong. Amongst other grounds, he also charges that defendant is preparing to erect a mill near the dam, but does not charge or show that the damage to him will thereby be increased. Besides the prayer for a decree that the proper height of the dam shall be determined and fixed, and the prayer for general relief, he asks for an injunction restraining defendant from continuing the dam at its present height, or any height that will cause the water to overflow his land, or from building a mill, or raising said dam, or doing any act that will, in any way, tend to cause the dam to continue as it now stands. The Chancellor granted an injunction, enjoining defendant from raising the dam higher, or from doing any act that will strengthen it at its present height, or make it more permanent than it now is:

Held, That as there is no charge in the bill, and no proof at the hearing, of an intention or threat of defendant to increase the height of the dam, and defendant made affidavit that none such existed, no necessity for the injunction on that point was shown.

2. As all the rights of the parties may be adjusted at the final hearing, and the height of the dam be fixed by a decree, so that there can be no further damage to complainant, the defendant should not, in the meantime, be disabled from protecting the dam against destruction by high water or other accidents, which is done by the injunction as granted.

Injunction. Riparian rights. Before Judge KNIGHT. Cherokee County. At Chambers. October 4th, 1873.

James Steele filed his bill in Cherokee Superior Court, alleging that he owned lots of land numbers two hundred and fifty-seven, three hundred and twenty, three hundred and twenty-seven, and three hundred and twenty-nine, that part

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of two hundred and fifty-six lying south and south-east of Etowah river, that part of two hundred and fifty-eight which lies on the south side of said river, and that part of number three hundred and nineteen which lies east of Little river and south of said Etowah river, all in the twenty-first district of the second section of Cherokee county; that they are bottom lands, and solely valuable for farming purposes, and lie, in part, between said rivers; that neither of said rivers is a navigable stream; that Newton J. Wheeler, in the summer and autumn of 1871, without complainant's consent, and in violation of his right to have the water in said rivers to flow as it had been accustomed naturally to flow, erected a mill-dam across said Etowah river on his, the said Wheeler's, own land, and has continued such dam up to the time of filing the bill. That said dam raised the water in said rivers and caused it to stand thirty inches higher at the junction of the same than it did before the dam was built; that by reason thereof the water in the Etowah river was raised and caused to stand six inches higher at the upper line of lot number two hundred and fifty-six, and the water in Little river was raised and caused to stand eighteen inches higher at the upper line of lot number three hundred and twenty-nine, and eight inches at the upper line of lot number three hundred and twenty-eight; that by reason of said dam the lands of complainant were made more wet and less fit for cultivation than before it was built; that the water has backed into complainant's ditches and rendered them useless for drainage; that the dam has so raised the water as to wholly destroy a ford of complainants, and a shoal on which there had been a fish-trap, and on which complainant intended to put another, but was prevented by the dam from doing so; that the destruction of the ford causes complainant trouble, expense and delay, in going a greater distance to a bridge, and in increasing his difficulty and inconvenience in securing tenants to cultivate his land; that the dam obstructs a large quantity of green timber that had been cut down in 1872, and prevents its passage down the river, and it now lies decaying in the river, and

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complainant fears it will produce sickness ; that complainant fears the mud accumulating in the river, by reason of the dam, will raise the bed thereof and render his low-lands valueless ; that pending the erection of the dam complainant notified defendant that he did not consent to or acquiesce in its erection, and that since the dam was completed he has demanded of him to so lower it as to let the water back to its former height, which he wholly refuses to do ; that he sued defendant in six or more actions at law in Cherokee Superior Court, to recover damages for the injury caused by the erection of the dam, only one of which actions has been tried, and the remainder are still pending ; that in the case that was tried, the jury found for complainant \$1 00, and that, at great expense and trouble, he will have to continue to sue defendant, unless he is relieved in equity ; that his damages, though certain and permanent, are difficult of estimation, and are irreparable in money ; that complainant is informed and believes that defendant intends to erect, at an early day, a grist or wheat mill in addition to his other improvements, and is now taking steps to get the lumber for said mill.

The bill prays an injunction to restrain the defendant from continuing said dam at its present height, or any height that will cause the water in either of said rivers to stand upon complainant's property higher than before the dam was erected, and also to restrain him from building any mill, raising said dam, or doing any act that will, in any way, tend to cause said dam to continue as it now stands.

On the hearing of the motion for injunction, counsel for complainant read the bill and submitted affidavits sworn to by Erwin Wiley, Henry Steele and A. B. Durham, stating that after defendant's dam was commenced, and before it was finished, several stakes were put up by the friends of complainant, and at his instance, at the water's edge, on the river, one at the mouth of Little river, where it flows into the Etowah ; that the height of the stake was cut on a tree standing at the junction of the rivers, and that when the dam was completed, the water was raised thirty-two inches at said

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stake, and has continued so from that time. The affidavits also stated other facts going to corroborate the allegations of the bill.

The defendant filed his answer, and submitted twelve affidavits in support thereof. The answer admits complainant's title to the land, as charged, except as to lot number, so far as he knows; admits the erection of a mill-dam across Etowah river, three-quarters of a mile below the lowest line of complainant's land; denies that the dam raises the water thirty inches at the junction of the rivers, as charged; denies that the dam has raised the water in any place, as charged; denies that the dam raises the water so as to injure complainant's lands, or submerge or drown any shoal suitable for a fish-trap, or to destroy and render useless any ford on complainant's land, or to render any of his lands less fit for cultivation, or to choke up the ditches and render them less efficient drains; admits that there is timber felled in the river, but alleges that the timber was felled by complainant's tenants to prevent defendant from floating a flat-boat down the river; admits that suits were brought, and are now pending, as alleged in the bill; denies that the dam has caused mud and sand to accumulate in the bed of the rivers, or that it will have the effect which the complainant surmises; admits that he did intend to erect, and was erecting, a cotton gin on his own place, at or near the said dam, and also that, at some future day, he might erect a flouring mill; denies that complainant ever protested against the building of the dam until it was completed, but, in no event, has he ever threatened to raise the dam any higher, nor does he expect or intend so to do.

The affidavits submitted by defendant sustain his answer, and most of them were made by men who were familiar with the rivers and the land said to be affected by the dam, some of whom had been raised on the rivers, and others had known them familiarly twenty years, and all of them had made a close personal examination as to the facts to which they testified.

The Chancellor passed the following order :

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"That the defendant, Newton J. Wheeler, be enjoined, until the final trial of this case, from raising the dam named in the bill higher than it now stands; and that he be also enjoined from doing any act that will strengthen the dam at its present height, or make it more permanent than it now is, until the final trial of this case."

To this judgment the defendant excepted, and now assigns the same as error.

LESTER & THOMSON, for plaintiff in error.

JULIUS BROWN, for defendant.

TRIPPE, Judge.

1. The injunction was granted restraining the defendant from increasing the height of the dam. So far as it was made to appear at the hearing for the injunction, the mill-dam was completed, and there was no charge in the bill that the defendant had threatened or purposed to raise it higher. Nor was there even any affidavit showing such intention. On the contrary, the defendant denied, under oath, that any such intention existed. There was, therefore, nothing calling for the injunction on that point. If such an effort be made hereafter by the defendant, there will be time enough for complainant to move. The injunction also forbade the defendant to strengthen the dam, or to do anything to make it more permanent than it now is. This was denying to the defendant all right to protect any portion of the dam. If it be eight feet in height, it may be ascertained on the final hearing that a reduction of two or three feet may relieve complainant of the damage complained of. The prayer of the bill is not that the dam be destroyed or totally removed, but that the proper height of it shall be determined and fixed by a decree. There is also a prayer for general relief, etc. Under these prayers, complainant can obtain security against future damage, and indemnity for what has accrued to the time of trial.

2. We think the best direction to be given to the case is to

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remit the parties to an adjustment of their rights at the final hearing, when the height of the dam can be fixed by a decree so as to prevent further damage to complainant. In the meantime, the owner of it should not be disabled from protecting it against destruction by high waters, or other accidents, as is done by the injunction granted. The defendant is not charged to be insolvent and incapable of responding to any recovery that may be obtained by complainant. It does not appear that the trespass is irreparable in damages, or that the injunction is necessary to avoid circuitry and multiplicity of actions. Section 3002, New Code, provides, "where the consequences of a nuisance, about to be erected or commenced, will be irreparable in damages, etc., a Court of equity may interfere to arrest it before it is completed." So, also, by section 3219, will a trespass be restrained where the injunction is necessary for the avoidance of multiplicity of actions. Here the damages can be ascertained in the pending suit, and one trial may finally adjudicate all rights. The order of the Chancellor, as granted, would be an indirect way of abating a nuisance already existing, by injunction, by leaving it to time and accident and decay to do the work of destruction.

Judgment reversed.

ROBERT E. CUNNINGHAM, plaintiff in error, vs. JOHN M.
CLARK & COMPANY, defendants in error.

1. Where one was under a contract to accept and buy a lot of corn from the plaintiff, between the 10th and 20th of April, and on the last day he agreed to extend the time for a tender until the 21st, and on the 21st the plaintiff tendered a lot in the morning, which was not accepted, and again in the evening, which the defendant refused to look at: *Held*, That it was not error in the Court to admit the evidence of a tender at any time during the day on the 21st, and that it was not error to refuse to permit defendant to show that plaintiff had made several tenders, between the 10th and 20th of April, of bad corn, and thus to justify defendant in refusing to look at the second tender on the 21st.
2. The verdict of the jury in this case, turning, as it did, upon whether the jury believed the version of one or the other party at the time of

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the tenders, on the 21st, is supported by the evidence, and, although the proof appears somewhat stronger for the defendants than the plaintiff, yet, as the jury has given the most weight to the plaintiff's evidence, and the Judge has refused to interfere, this Court will not do so.

Contracts. Tender. Evidence. New trial. Before Judge GOULD. City Court of Augusta. November Term, 1872.

Clark & Company brought assumpsit against Cunningham for \$250 00, alleging that, on February 22d, 1872, the defendant bought from the plaintiffs two thousand bushels of prime white corn, at the rate of one dollar and five and one-half cents per bushel, to be delivered between the 10th and 20th days of the succeeding April, and to be paid for on the delivery thereof; that plaintiffs tendered said corn on the 12th of April, 1872, in accordance with the terms of the said contract, but defendant refused either to receive or pay for the same, whereby the plaintiffs were compelled to resell said corn at a loss of \$189 60.

The declaration also contained a count for goods sold and delivered, with a credit thereon of the amount received by plaintiffs on the sale of said corn.

The defendant pleaded the general issue, and that the plaintiffs had not tendered the corn according to the terms of the contract.

The following evidence was introduced :

"AUGUSTA, February 22d, 1872.

"We, John M. Clark & Company, agree to deliver to R. E. Cunningham, or agent, two thousand bushels of prime white corn in burlap sacks, in good order, between the 10th and the 20th of April, 1872, for one dollar and five and one-half cents per bushel, sacks to be as good as burlaps, not gunnies. Cash. (Signed) JOHN M. CLARK & COMPANY."

"AUGUSTA, February 22d, 1872.

"I, R. E. Cunningham, promise to receive from John M. Clark & Company two thousand bushels of prime white corn,

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in burlaps or its equivalent, between the 10th and 20th of April, 1872, at one dollar and five and one-half cents per bushel. Cash.

(Signed)

"R. E. CUNNINGHAM."

"It is agreed between the parties that time is of the essence of the contract, *i. e.*, the plaintiffs admit that no tender made after April 21st, 1872, would be good, the defendant, in entering into said agreement, not meaning to admit that the tenders made on that day were good.

"The defendant waives all defense by reason of any informality in the tender as to place, or any defense to which he might be entitled, under section 2596 of the Code."

AMOS CLARK, one of the plaintiffs, testified substantially as follows: The defendant extended the time for the delivery of the corn to April 21st, 1872, for the express purpose of enabling plaintiffs to tender a specific lot they had at their mill; tendered this lot on April 21st, in the morning; the defendant refused it; tendered it again in the afternoon and he refused it again; don't think I told him it was in chicken gunny sacks when I first tendered it; sold it on his account; loss was \$189 60, and defendant owes me that amount; the corn was in sacks similar to the one exhibited, (presenting a Dundee sack;) sacks better than burlaps.

The testimony of the second tender on Monday was admitted over defendant's objection, and he excepted.

The defendant testified as follows: Clark, after making several tenders, which I refused, because the corn did not come up to contract, some being rotten, came to me on the evening of the 19th of April, (it being Saturday,) and said he had a lot of corn at his mill, and if I would extend the time to Monday morning, April 21st, he would tender it; I consented, with the express purpose and understanding of allowing him to tender the lot at the mill on Monday; he came in and tendered it on Monday morning, Mr. Fairly being present; he said, in answer to my question, that it was in "chicken gunny" sacks, which are greatly inferior to burlaps; I asked him what reduction he would make; he said, "none;"

Cunningham vs. Clark & Company.

I refused to receive it; he did tender me a lot Monday evening, which I refused without looking at it, because I thought it was another attempt to defraud me.

J. W. FAIRLEY testified as follows: The time was extended to April 21st for the express purpose of allowing Clark to tender, on Monday, the specific lot of corn at the mill; was present when he tendered it, and he said it was in "chicken gunny" sacks, which are greatly inferior to burlaps; he refused to make any deduction, but afterwards met me and told me he would deduct five cents per sack on the sacks; the sack introduced in evidence by plaintiffs as that in which the corn was at the time of tender, is inferior to burlaps.

AMOS CLARK, recalled: I considered I had all day of the 21st; I told Fairly of the deduction I would make only as a compromise.

C. E. Staples testified, that he bought a lot of prime white corn from Clark in April, 1872.

Melville Branch testified, that the sack in evidence was worth five cents more in this market than burlaps.

Mr. Jarrell testified, that defendant refused to look at the corn tendered Monday evening.

The defendant offered to show several tenders made by plaintiffs of bad corn, between the 10th and the 20th of April, as an excuse for his failure to examine the lot tendered on the afternoon of Monday, the 21st. This the Court refused to permit, and defendant excepted.

The jury returned a verdict for the plaintiffs for \$189 60. The defendant moved for a new trial upon each of the aforesaid grounds of exception. The motion was overruled and defendant excepted.

WILCOX & WEBB, for plaintiff in error.

J. C. C. BLACK; BARNES & CUMMING, for defendants.

McCAY, Judge.

1. We see no error in the ruling of the Judge excluding the evidence that the plaintiff had offered to put off on de-

defendant had lots of corn between the 10th and 20th, as a ground of justification for defendant in refusing to look at his second tender of corn on the 21st. There is some excuse, it is true, if the defendant was of the opinion, from the plaintiff's acts, that he was trying his best to deceive and entrap him. But, under the contract of the 19th, to extend the time for the tender to the 21st, it would seem that the defendant had waived the previous failures, and whilst there is a moral right to distrust one who has proved faithless several times before, yet, that can hardly come within the rights the law recognizes. It was the contract, so one witness says, that the corn might be delivered on the 21st, at any time during the day. On that day it appears that plaintiff made two offers. The first offer is proven to have been in accordance with the contract; that is, it was good corn, and in sacks, better than burlaps. The second offer seems to have also been of the required quality in the proper sacks. There is evidence, pretty strong evidence, too, that plaintiff said, at the time of the first tender on the 21st, that the sacks were "chicken gunny." He denies this, and the proof is that they were, in fact, Dundee sacks, better than burlaps. The Judge told the jury it was for them to decide between these conflicting statements. This was, we think, the turning point of the case. The jury have found for the plaintiff; in other words, they have believed the plaintiff's statement, and, coupled with the fact that the corn was, in fact, in Dundee bags, we think they had a right so to do.

2. At any rate, as the Judge has refused a new trial, we do not think the evidence for the defendant was so strong as to make the judgment of the Judge an abuse of his discretion, to grant or refuse a new trial in such cases. As there was no error of law in the rulings of the Court on the trial, we affirm the judgment.

Judgment affirmed.

Lindrum et al. vs. Robson.

PHÆBE A. LINDRUM *et al.*, plaintiffs in error, *vs.* JAMES A. ROBSON, defendant in error.

The certificate of the former owner of a judgment, given since its assignment, that she had, on due reflection, become satisfied that said judgment was wrong, and that she was mistaken when the case was pending in Court, cannot affect the rights of the assignee.

Judgment. Equity. Before Judge ROBINSON. Baldwin Superior Court. August Term, 1872.

For the facts of this case, see the decision.

WILLIAM MCKINLEY ; CRAWFORD & WILLIAMSON, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants to enjoin the collection of an execution, and to vacate the judgment on which it issued. On the trial of the case, the jury found a verdict against the defendants, vacating the judgment. A motion was made for a new trial on the ground that the verdict was contrary to the charge of the Court, contrary to law and the evidence, which was overruled, and the defendants excepted. The complainant alleges in his bill that one of the defendants, Mrs. Robson, obtained a judgment against him in the Superior Court of Baldwin county, on a due bill given by him to her, for \$500 00, on the 29th of August, 1871, on which judgment an execution issued and was assigned and transferred to Mrs. Lindrum on the 9th of October, 1871, by the plaintiff therein. Afterwards, on the 5th of December, 1871, the complainant obtained a certificate from Mrs. Robson, in which she stated that since the assignment of said judgment and execution to Mrs. Lindrum, she had, on due reflection, become satisfied that the said judgment was wrong, and that she was mistaken when the case was

pending in Court. The defendant, Mrs. Robson, in her answer to the discovery prayed for in complainant's bill, positively denies there was any error or mistake in said judgment, and that the recitals in said certificate are false and fraudulent, and that said paper was obtained from her by the complainant, fraudulently, and by threats of violence if she did not sign it. Mrs. Lindrum denies all knowledge of any error or mistake in the judgment at the time of the assignment thereof to her. The answer of Mrs. Robson as to the manner in which the paper was procured from her, was controverted by two witnesses. In our judgment, taking the allegations in the complainant's bill to be true, as well as the evidence offered in support thereof at the trial, he was not entitled to the relief prayed for, especially, as against the assignee of the judgment, who could not be affected by the declarations of Mrs. Robson contained in the certificate, after the assignment of the judgment by her. The Court erred in overruling the motion for a new trial.

Let the judgment of the Court below be reversed.

ENOCH STEADMAN, plaintiff in error, *vs.* AUGUSTUS H. LEE,
defendant in error.

We see no abuse of the discretion of the Court in granting the new trial, and the judgment is accordingly affirmed.

New trial. Before Judge GREENE. Newton Superior Court.
September Term, 1872.

Lee brought complaint against Steadman on a note for \$2,000 00, dated April 9th, 1866, due on or before January 1st next thereafter, with credits thereon as follows: May 25th, 1866, \$500 00; January 7th, 1867, \$510 29; February 28th, 1867, \$100 00; March 19th, 1867, \$250 00. The defendant pleaded the general issue and set-off.

The evidence made substantially the following case :

Steadman vs. Lee.

Plaintiff sold to defendant a store-house and lot in Covington, in part payment for which the note sued on was given. The note was to be paid in goods out of the store kept by defendant and one David W. Spence, at cash prices. Goods were accordingly purchased from said store by plaintiff, which were charged on the books of Steadman & Spence to the private account of Steadman, and from time to time credits of the amounts purchased were entered on the aforesaid note. The account of the plaintiff with defendant, pleaded as set-off, amounted to \$1,294 91, with two credits thereon, the first of \$4 50, and the second as follows: "1867. June 1st. By cotton for Covington Mills Company, \$446 40." In reply to this account the plaintiff introduced the following receipt:

"Received of A. H. Lee, by settlement with Col. Steadman: April 21st, \$800 00 by credit on E. Steadman's note; May 26th, 1866, \$500 00 by credit on E. Steadman's note; January 7th, 1867, \$510 29; by other book credits, \$15 15, in full of book account. This January 7th, 1867.

(Signed)

"E. STEADMAN."

The defendant also claimed that he owned "nearly the entire interest in the Covington Mills Company, and has owned the greater portion of the stock of said company for some time," and that the plaintiff was indebted to said company from \$740 00 to \$1,400 00, on the following receipt:

"COVINGTON MILLS, GA., February 4th, 1864.

"Received of W. F. Kennedy, agent, \$2,600 00 in payment for thirty-seven hundred and fourteen pounds of cotton, to be delivered at the factory on or before the 1st day of September next. He agrees to furnish rope and bagging, the weight to be deducted in weighing the cotton. In case he should be unable to furnish it, then he is to put it up in boards and withes. If the cotton should be burned up, then I agree to refund the money with interest.

(Signed)

"AUGUSTUS H. LEE."

The defendant testified that the cotton specified was not delivered according to contract, but that after the war closed, Kennedy, the superintendent of the Covington Mills, compromised the claim with plaintiff for \$1,000 00, which had not yet been paid. That he did not know where the original receipt was; did not remember having delivered it to the plaintiff. That plaintiff carried cotton in settlement of said receipt, to the depot, and defendant took the receipt of the railroad agent for the same. That he remembers to have gone to plaintiff's house to see some cotton, but does not remember buying any from him. The cotton delivered at the depot by the plaintiff was for the Covington Mills.

As to the credit of \$446 40, on the account against plaintiff, Spence testified as follows: The entry of the credit of \$446 40 on the ledger was made by witness from a private book, a kind of a blotter kept by defendant himself. It was a credit to plaintiff. Defendant did not keep his book regularly. He sometimes commenced at the close of a month and ended at the first of it. Thinks the entry of \$446 40 an improper credit on that account, as it seemed to him to be a transaction between the Covington Mills and the plaintiff. Witness made the entry without consulting defendant.

The defendant testified, substantially, as follows :

The cotton I agreed to pay to the Covington Mills was delivered by me to the defendant at the Georgia Railroad depot, in all six bales. This was in full settlement of said indebtedness. The defendant took the receipt of the railroad agent for the cotton and delivered to me my receipt to the Covington Mills, which I tore up in his presence. Some time afterwards defendant purchased another lot of cotton from me. It was stored under my dwelling house in town. We went together to the house and rolled some of it out. He agreed to give me about twenty cents per pound for it. He was to carry it to the factory, weigh it and enter the proper credit upon my account. Thinks I delivered to him nine bales, weighing about four hundred pounds to the bale.

The jury returned a verdict for the defendant for \$865 87.

The Cotton States Life Insurance Company *vs.* Scurry *et al.*

The plaintiff moved for a new trial because the verdict was contrary to the evidence. The motion was sustained, and a new trial ordered. To this ruling the defendant excepted.

A. B. SIMS; A. H. SPEER, for plaintiff in error.

J. J. FLOYD, for defendant.

MCCAY, Judge.

We see no abuse of the discretion of the Judge in granting the new trial in this case. The verdict seems to us, as doubtless it did to the Judge, very unsatisfactory. Indeed, we are utterly at a loss to see on what it is founded. The jury seem to have been under some strange mistake, and to have entirely failed to get at the truth of the case, as it appears from the evidence. In such cases it is not only the right but the duty of the Judge to grant a new trial.

Judgment affirmed.

THE COTTON STATES LIFE INSURANCE COMPANY, plaintiff
in error, *vs.* ELLA W. SCURRY *et al.*, defendants in error.

Where an applicant for life insurance signs an application for a policy which contains a statement that "only the home officers of the company, in Macon, Georgia, have authority to determine whether or not a policy shall issue on application," and the agent through whom the application is made, gives a receipt to the applicant as follows: "Received of James R. Scurry \$375 00, the same being in payment of insurance in the Cotton States Insurance Company. This receipt being binding on said company until the policy is received." Such contract or receipt is not binding on the company to issue a policy, nor is the company bound by the receipt after the application is rejected. Whether it is binding on the company until action is had by the company on the application, is a question that does not arise under the facts of this case.

Insurance. Principal and agent. Before Judge STROZIER.
Dougherty Superior Court. April Term, 1873.

This was an action brought by Ella W. Scurry, and others, widow and children of James R. Scurry, deceased, on a contract of insurance alleged to have been made by the Cotton States Life Insurance Company for \$10,000 00 on the joint lives of James R. Scurry and his wife Ella, and payable on the death of either.

The defendant resisted the recovery on two grounds :

1st. That no contract of insurance was ever made. That only an application was made through an agent, and which was rejected by the company.

2d. That a material false representation was made in the application, which voids the contract, if made.

The second point is not involved in the decision. On the first point the following are the facts :

On the 6th day of September, 1871, Scurry and his wife made application, through J. S. Rains, an agent of the company, for the policy. They were strangers to Mr. Rains. The agent furnished Scurry with blank applications to be filled out. The applications were filled out, one by Mr. Scurry and one by Mrs. Ella W. Scurry, and were forwarded by the agent to the company at Macon, and were rejected. They contained a recital to the effect that "only the officers at the home office of the company, in the city of Macon, Georgia, have authority to determine whether or not a policy shall issue on any application."

Mr. Rains notified Mr. Scurry of the rejection by the company of the application for a joint policy for \$10,000 00, but said he thought he could induce the company to issue a joint policy for \$5,000 00. Mr. Scurry said "he would see about it—he wanted a policy for \$10,000 00," and did not say he would accept one for \$5,000 00, but would let him know if he concluded to take it. Mr. Rains, however, supposing he might accept one for \$5,000 00, so suggested to his principal, the company, who did issue a joint policy for \$5,000 00, and sent it to Mr. Rains. Mr. Rains did call to see Mr. Scurry to offer this policy for \$5,000 00, but found him drunk, un-

The Cotton States Life Insurance Company vs. Scurry et al.

able to do business, and said nothing to him about it, but returned the policy to the company, on which was indorsed by the Secretary of the company: "Canceled—returned rejected by the applicant." This last policy was dated the 15th day of September, 1871. James R. Scurry died on the 25th day of September, 1871. When the first application was made out on the 6th day of September, Scurry did not pay any money, but gave his note to Mr. Rains, and received from him a receipt as follows:

"\$375 50. Received of James R. Scurry three hundred and seventy-five dollars, same being in payment of insurance in Cotton States Insurance Company. This receipt being binding on said company until the policy is received.

(Signed)

"J. S. RAINS, Agent

"Cotton States Life Insurance Company of Macon, Ga.

"Baker County, Georgia, September 6, 1871."

The Court, amongst other things, charged the jury as follows: "That when an agent was authorized to take applications of parties for insurance, and receive and forward premiums for the company, and an agent does so, and gives a binding receipt when he receives said applications and premiums, then the company is bound for the insurance, whether the policy is ever issued or delivered or not, and such binding act is within the scope of his authority, and the same is a contract of insurance."

Counsel for defendants requested the Court to charge the jury: "That if, after the application of Scurry and wife had been considered and rejected by the defendants, and notice thereof given to Scurry with an offer to return his premium note, he consented to return the binding receipt, then plaintiffs cannot recover on said binding receipt, notwithstanding Scurry died with said paper in his possession."

The Court so charged with this qualification, "This is the law, provided the contract was inchoate and not executed. If the contract was executed, it was the right of Scurry to reject or accept the refusal of the company."

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The jury returned a verdict for the plaintiffs for \$10,000. A motion for a new trial was made upon the ground of error in the above charge, and in the qualification of the request to charge, and because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

B. H. HILL & SON ; SMITH & JONES ; G. J. WRIGHT,
for plaintiff in error.

VASON & DAVIS ; A. L. HAWES ; R. F. LYON, for de-
fendants.

TRIPPE, Judge.

Each of the applications, the one made by Scurry as well as the one by his wife, contains the statement that "only the home officers of the company in Macon, Georgia, have authority to determine whether or not a policy shall issue on application." Both of these applications were signed by the applicants respectively. The receipt given by the agent recited that it was binding on the company until the policy was received. Defendant in error insists that this bound the company to issue the policy. The question, therefore, is not what force the receipt had to the time of action on the application by the company ; for the application was rejected, a policy refused, and notice thereof given to the applicant. Did the company have the right to reject the application under the terms stated in it, and the terms of the receipt ? If a party sign a paper, the presumption of law is that he knows the contract, and of course that he has notice of the facts recited in it. The application in this case contained that which, in its legal effect and substance, was, that an agent did not have power to issue a policy or to determine and bind the company that one should be issued. It was "only the home officers of the company at Macon, Georgia, have authority to determine whether or not a policy shall issue." Even had the receipt

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stipulated, in terms, that the applicant should have a policy, it would have been in the teeth of the denial of such power to him, and with notice of such express denial to the person thus contracting with the agent. A principal is not bound by the acts of his agent when those acts are beyond the scope of his authority, and the person dealing has notice thereof: New Code, sections 2184, 2194, 2196. This rule, we think, determines this case, without discussing the principles touching the powers, generally, of agents of insurance companies, of general agents, and special agents, agents to issue policies and agents to receive applications, and how those powers have been, in many decisions and by elementary writers, held to apply differently in cases of fire and life insurances.

It has been asserted by an able writer, supported by the authority of several judicial decisions, that "the usage is so general that an agent of a life insurance company has no authority to conclude an agreement for insurance, that if such authority is claimed in a particular case there should be affirmative evidence of such authority, or of its repeated exercise with the knowledge of the company:" Bliss on Insurance, section 280. Where the authority claimed is expressly denied, and the person dealing with the agent has notice, there can be no question that the principal is not bound. If the agent had no power to bind the company to issue a policy, the fact that the applicant, knowing the want of such power, gave a note for the first annual premium to the agent, cannot alter the case: *St. Louis Mutual Life Insurance Company vs. Kennedy*, 4 Bush., 450. In that case it was held that the note was a memorandum only and not a waiver of a condition precedent. To hold that a note thus given enlarges the powers of the agent and conferred upon him authority expressly withheld by the company, would make the agent and a third person thus dealing with him, the arbiters of what an agent's powers shall be. It may be proper to add that this action was not founded on the policy for \$5,000 00, which was issued subsequent to the rejection of the application for \$10,000 00, and notice of which was given to the applicant.

The charge of the Court being in conflict with what we doubt not is the law as above stated, the judgment refusing a new trial is reversed.

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JOSEPH ALLEN, administrator, plaintiff in error, vs. MARTHA F. WOODSON, executrix, et al., defendants in error.

1. After a bill seeking a discovery has been answered the complainant cannot amend his bill so as to waive discovery, and thus get clear of the defendant's answer.
2. It is not error in the Court to call the attention of the jury to the importance of the case, and trouble it has given, and to suggest the desirableness of disposing of it by a final verdict.
3. When a receipt acknowledged a certain sum in full of certain described promissory notes, and in full of all demands, the general words, though they do not enlarge the particular words as to what transpired at the time, yet they do import and may be used to prove that the party giving the receipt had, at the time, no other demands against him to whom the receipt was given.
4. When a bill was filed against the administrator of a deceased partner seeking an account of certain partnership funds which it was alleged had been collected by the partner and misapplied, and pending the suit and after the 1st of January, 1870, the bill was amended so as to charge, in addition, that said deceased partner had also received to his own use the rents of certain real estate belonging to the partnership, and that he had not accounted therefor:

Held, That the amendment did not introduce a new cause of action but only added an item to the original cause, and if the plea of the statute of limitations was not good to the original suit it was not good to the amendment.

5. The verdict of the jury in this case is supported by the evidence and ought not to be disturbed, and this being so the error of the Court, as to the statute of limitations in its application to the amendment, is immaterial.

Equity. Discovery. Amendment. Charge of Court. Jury. Receipt. Before ROBERT P. TRIPPE, Esq., Judge *pro hac vice*. Upson Superior Court. May Term, 1872.

Joseph Allen, as administrator of Xenophon Bowdre, deceased, filed his bill against Martha F. Woodson, as executrix,

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and Benjamin Bethel, as executor, of William D. Woodson, deceased, and Emma R. Redding, as administratrix of Thomas J. Redding, deceased, making, substantially, the following case :

On or about the 8th of August, 1859, William D. Woodson and Xenophon Bowdre were partners doing a mercantile business in the town of Thomaston, under the firm name of Woodson & Bowdre. They had carried on said business under said firm name in said place for several years prior to that date. On said day the partnership was dissolved by mutual consent, and Bowdre retired from business, leaving all of the assets of said firm in the hands of Woodson. Soon after the dissolution aforesaid, Woodson formed a partnership with one Thomas J. Redding, under the firm name of Woodson & Redding, and the said last named firm did business in said place from some time in August, 1859, to August, 1864, when the said copartnership was dissolved by the death of Redding. During the continuance of the last named firm, Woodson, having in possession the assets belonging to the late firm of Woodson & Bowdre, carried into the business of the said Woodson & Redding a large amount of said assets, with the knowledge and consent of Redding. Bowdre knew nothing of the use of the assets of Woodson & Bowdre by Woodson & Redding, nor the amount of the same, nor were these facts known to complainant until after he became the administrator of Bowdre, and the amount of said indebtedness was not known to complainant at all. Not knowing the amount so transferred and used by them, and believing and alleging that the books were destroyed, complainant prayed that defendants should discover the amount, and should particularly discover any and all evidences of the use of the money as charged, and prayed that defendants should account and settle fully as to all of the affairs and assets of Woodson & Bowdre which had gone into the hands of Woodson & Redding as charged, or that had been used by them, and prayed that defendants should be decreed to pay over to complainant, as administrator, his intestate's half of said assets so used.

The bill was filed in October, 1868. Subsequently, on the 20th of October, 1871, it was amended by praying specifically for payments of rents due for the use by Woodson & Redding of the store-house belonging to Woodson & Bowdre. This amendment was demurred to and disallowed, because it was filed after January 1st, 1870.

At the May term of 1872, complainant having ascertained that the books of Woodson & Redding were in existence, and that said books showed the amount of the assets of Woodson & Bowdre used by Woodson & Redding, except the use of the store-house, and being able to prove the use of the store-house, without resorting to the conscience of defendants, amended his bill by striking out the prayer for discovery from either or all of the defendants. This amendment the Court refused to allow for the purpose of waiving the answers of the defendants.

The answer of the defendant, Emma R. Redding, administratrix, is unnecessary to an understanding of the questions passed upon by the Court.

Martha F. Woodson, executrix, answered, substantially, as follows :

She admits the facts as to the copartnership of Woodson & Bowdre up to 1859, the dissolution and Bowdre's retiring ; admits the formation of the partnership between Woodson & Redding, and its continuance to the death of Redding in August, 1864 ; she admits the death of Woodson, and that she is the executrix ; she discloses the fact that the books of Woodson & Redding are in existence, and are in her possession, but she denies that they furnish any evidence whatever of any indebtedness on the part of Woodson & Redding to Woodson & Bowdre ; she denies any indebtedness on the part of Woodson & Redding to Woodson & Bowdre, in any manner, and gives as a reason that, on the 1st day of September, 1866, Woodson & Bowdre, only a few days before the death of Woodson, had a full and final settlement of all matters between them or the firms, and tenders a receipt, claiming it as evidence of the same ; she admits, that at the time of the

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death of Woodson, in 1866, the firm of Woodson & Redding was indebted to the firm of Woodson & Bowdre, but says that the same was evidenced by two notes, or merchants' tickets; that Woodson, on his death-bed, told her that these two notes were due by Woodson & Redding to Woodson & Bowdre; she admits that Woodson died in September, 1866, and that after her qualification as executrix, to-wit: in 1868, she allowed her co-executor, Benjamin Bethel, (since resigned), to pay the one-half of the principal and interest on said notes, to-wit: about \$1,400 00, or some such sum, and sets up this as a payment in full of all matters between them or the said firms, and tenders the receipt of complainant as evidence of a full settlement; she says that the books of Woodson & Bowdre were kept in the store of Woodson & Redding, and that the collection of the accounts, notes, etc., was given to Bowdre; that he rode several days endeavoring to make collections, but she does not know that he ever collected one dollar; she denies that Woodson ever collected any money which he did not properly account for, and giving as a reason for so stating, that on one occasion she knew him to collect \$122 00 and divide it with Bowdre; she denies that Woodson & Redding ever borrowed any money of Woodson & Bowdre, or that they ever used any of the money of Woodson & Bowdre.

Benjamin Bethel, executor of Woodson, answered, in substance, as follows: He knew nothing of any indebtedness on the part of Woodson & Redding to Woodson & Bowdre, except that which was evidenced by a due-bill and a merchants' ticket found in the papers of Woodson & Bowdre, and one-half of which was paid to complainant, in 1868. Woodson & Bowdre had some uncollected notes and accounts against persons with whom they traded as merchants, and after the qualification of Bethel, as executor, Bowdre and himself agreed to divide them; the division was made, all but delivering to Bowdre his share of the uncollected demands, and Bowdre's death prevented a complete settlement by the division of these assets. At this time nothing else was attempted to be settled but a division of the assets of Woodson & Bowdre as afore-

said, and no claim was made by Bowdre of any amount being due by Woodson & Redding to Woodson & Bowdre. After the death of Bowdre, Bethel divided the notes and accounts belonging to Woodson & Bowdre with complainant.

Subsequently Mrs. Woodson filed an explanatory answer, in substance as follows: She says the books of Woodson & Bowdre, after the dissolution, were kept in the store of Woodson & Redding; that they were open to the inspection of Bowdre as well as Woodson, and that she is satisfied that Bowdre collected a large amount of said assets and appropriated such collections to his own use; she denies that Woodson ever collected or used any of said assets, but admits that from a careful examination of the books of Woodson & Redding, she thinks that they do show that Woodson & Redding received from, or borrowed money of Woodson & Bowdre; she says these transactions were mutual between the two firms, and she thinks they were all settled up before the death of said Woodson; she says she is strengthened in this supposition from the fact that, in the year 1864, the books of Woodson & Bowdre being destroyed, they were unable to make an accurate settlement, and they agreed upon a plan of dividing the money on hand, and such assets as might be collected, as fast as collected, and that a few days thereafter Bowdre receipted Woodson & Bowdre, and Woodson receipted Woodson & Bowdre, each for \$1,452 35; she admits that she cannot say that the foregoing is a settlement in full of all matters, but she is inclined to think it is so, and pleads this settlement in bar of any recovery; she says she has personal knowledge of money collected for Woodson & Bowdre being equally divided between them, but she does not give any amount; she admits that the books of Woodson & Redding do show entries of indebtedness from Woodson & Redding to Woodson & Bowdre, which entries she says she did not understand when she filed her first answer, and she thinks these entries, if they show any indebtedness at all, are over-balanced by other entries in favor of Woodson & Redding and against Woodson & Bowdre; she says the date of the last entry,

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showing indebtedness, was in 1860, and pleads the statute of limitations; she says Woodson had money sufficient to advance his full share of the capital stock in the firm of Woodson & Redding, and had no necessity for borrowing or using the money of Woodson & Bowdre, in said firm business of Woodson & Redding; she says that on the 1st day of September, 1866, two notes held by Xenophon Bowdre against W. D. Woodson, individually, for several thousand dollars, were settled in the following manner: An account held by William D. Woodson, individually, against Xenophon Bowdre, and an account in favor of Woodson & Redding against Xenophon Bowdre, individually, were brought against the two notes belonging to Bowdre, and the balance then due Bowdre on the two notes was paid by Woodson in tobacco; she insists that this shall be considered as a final settlement of all matters between them, both as individuals and as members of the two firms, and makes an exhibit of this settlement, pleading the same in bar of a recovery; she says she made a mistake in her original answer, wherein she said that the due-bill and merchants' ticket or memorandum paid by Bethel to complainant, were due at the death of Woodson, and wherein she said that Woodson so told her on his death-bed; she says she intended to say that immediately after the settlement referred to, in 1866, Woodson called her to his bed-side and told her that the two notes just settled was all that he owed; that she so intended to say, but her draftsman made her say otherwise; she avers that said due-bill and merchants' ticket were not due and unpaid; that they were imprudently paid, prays that complainant may be decreed to refund the amount he received on them.

Pending the litigation Bethel was discharged from the trust, as executor, and having fully accounted to his co-executrix, the bill was dismissed as to him.

The evidence introduced upon the trial was voluminous and conflicting. The books of Woodson & Redding were claimed by complainant to show an indebtedness to Woodson & Bowdre of between \$4,000 00 and \$5,000 00. It was

claimed by defendants that the same books showed that this indebtedness, if it ever existed, had been discharged.

It will be observed, that the defendants set up, as a bar to the complainant's claim, two settlements, one of February 15th, 1864, and the other of September 1st, 1866.

The instruments introduced to support the first were as follows:

“GEORGIA—UPSON COUNTY.

“THIS INDENTURE, made this, the fifteenth of February, in the year of our Lord one thousand eight hundred and sixty-four, between W. D. Woodson, of the county and State aforesaid, of the one part, and Xenophon Bowdre, of the same place, of the other part, is such that, whereas, the said parties, in the year of our Lord one thousand eight hundred and forty-two, did form a copartnership for the sale and purchase of goods, wares and merchandise, under the firm name and style of Bowdre & Woodson, said firm having its place of business at Thomaston, in said county, and did there afterwards carry on said business until the year of our Lord one thousand eight hundred and fifty-one, when the same was discontinued; and, whereas, the said parties, in the year of our Lord one thousand eight hundred and fifty-four, commenced similar business in said town under the firm name and style of Woodson & Bowdre, which was thenceforward continued until the year of our Lord one thousand eight hundred and fifty-nine, when the said William D. Woodson purchased from said Xenophon Bowdre his, the said Xenophon Bowdre's, interest in the stock of goods then on hand, the said partnership thereby becoming dissolved; and, whereas, before a settlement between said parties of and concerning their said business had taken place, to-wit: in the year of our Lord one thousand eight hundred and sixty-three, the books of said concern were destroyed by fire, and the data which would have enabled said parties to have made said settlement with accuracy thereby lost, and it being the desire of said parties, in the absence of such data, to effect such a settlement as shall and will, in their opinion, approach to equity and do justice—

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"THIS INDENTURE WITNESSETH, That, in consideration of the present, and to effect the object aforesaid, the said parties have mutually agreed, and by these presents do agree, to the following method to be pursued in settlement between them of the business of said firm, that is to say : all moneys on hand belonging to said firm shall be equally divided between said parties, and receipts in writing of the parties respectively be interchangeably delivered therefor. All assets remaining of said concern is jointly owned in equal proportions by the parties, and may be collected or reduced to money by them, or either of them, and all moneys realized therefrom shall be divided and receipts delivered as aforesaid.

In testimony whereof the parties have hereto set their respective hands and seals, on the day and year above written.

"W. D. WOODSON, [L. s.]

"X. BOWDRE, [L. s.]"

"Done in duplicate in presence of

"THOMAS CAUTHORN,

"E. R. ATWATER, J. I. C."

"THOMASTON, February 23d, 1864.

"Received of Woodson & Bowdre \$1,452 35, value received. This being in accordance with the agreement entered into between them, bearing date this 15th instant.

(Signed)

X. BOWDRE."

Also, a similar receipt signed by William D. Woodson.

In reply to this alleged settlement the complainant introduced the following letter :

"THOMASTON, GA., May 23d, 1865.

"Mrs. E. C. Redding, Macon, Ga.:

"MADAM—The coin of which you write was in amount a little over \$600 00, and was last winter appropriated in part payment for house-rent for the brick store.

"The firm of W. & R. was due me some \$1,400 00 up to the time of the fire, for the rent of that store, and the above amount of coin is all that I have received. The first disposition to be made of the assets of our business is to pay the

debts of the concern ; of these there is owing in New York about \$1,000 00 ; in Savannah some \$300 00 ; to Maj. Cobb, of this place, \$500 00 for borrowed money, of which I knew nothing until the past two months, and to Woodson & Bowdre an account for borrowed money, and for store rent, (the dry goods store), the amount I cannot state without referring to our books. These amounts, with the balance due me, are about all the debts I am aware of at present.

“ Respectfully,

W. D. WOODSON.”

The instruments introduced to support the settlement of September 1st, 1866, were as follows :

“ Received of William D. Woodson \$2,485 50, in full for the balance due me on two notes given by the said Woodson, one for \$2,578 23, dated August 8th, 1859, and due at six months ; the other for \$8,613 16, dated August 8th, 1859, and due twelve months after date, with the interest thereon after deducting credits on said notes and accounts held by said Woodson against me, and in full of all demands—this being a final settlement made myself, E. A. Flewellen and William A. Cobb for the said Woodson, the above payment being in sixteen boxes tobacco, weighing net sixteen hundred and fifty pounds at \$1 50 per pound.

(Signed)

“ X. BOWDRE.

“ September 1st, 1866.”

“ X. Bowdre to W. D. Woodson—

“ Sixteen boxes tobacco, weighing one thousand six hundred and fifty-seven pounds, at \$1 50 per pound, \$2,485 50, marked D. Jones, Rose Bud. The above settled in full. Settlement between the said Woodson.

(Signed)

“ WILLIAM A. COBB,

“ E. A. FLEWELLEN.

“ September 1st, 1866.”

The accounts referred to in said receipt were, one in favor of Woodson, individually, taken from his private memorandum book, and the other in favor of Woodson & Redding.

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It was contended by complainant that this settlement did not extend to any matters beyond the two notes specified in the receipt which were given by Woodson, individually, for Bowdre's interest in the stock on hand at the time of the dissolution in August, 1859, and could not be made to cover an indebtedness existing on the part of Woodson & Redding to Woodson & Bowdre.

Upon this point in the case the complainant requested the Court to charge as follows :

“ If the settlement and receipt were exclusively of a matter of individual indebtedness of Woodson to Bowdre, individually, then such words as ‘in full of all demands,’ cannot be extended so as to cover matters not taken in the settlement, existing between Woodson and Bowdre as partners, the one of the firm of Woodson & Redding, and both as partners of the firm of Woodson & Bowdre.”

The Court refused the request, and charged as follows :

“ If Bowdre gave Woodson a receipt specifying that certain debts between themselves were paid without showing in the receipt that they had anything to do with partnership matters, then the legal meaning and effect of such receipt, without further evidence, would be confined to individual matters, and the words, ‘and in full of all demands’ in said receipt, would be limited to individual claims or indebtedness. But if, from other testimony, it appears or is proven that one of the debts specified in the receipt was not an individual claim between Woodson and Bowdre, but was between Bowdre on the one side, and Woodson & Redding, as partners, on the other; and that the payment or receipt of money therein specified to have been made, was not the individual property or money of Woodson, but belonged to the assets of Woodson & Redding, then, although nothing may have been settled at the time the receipt was given, but what was specially stated in the receipt, yet, as such facts, if proven, would enlarge or extend the terms of the receipts beyond their simple legal effect, and would show that more than individual claims were then settled, so those facts may be considered by the jury in construing

ing the words 'and in full of all demands,' and in determining whether they shall be confined to individual matters, or extended into an acknowledgment by the party giving it, that all claims of Bowdre on Woodson & Redding had been settled and were therein so receipted for or acknowledged. The words in the receipt, 'and in full of all demands,' in this or any other receipt, are not confined to the immediate matter or matters specially mentioned in the receipt, but extend to all liabilities or debts on account against the party to whom it is given, and may be taken in connection with the other evidence as testimony showing the payment of all claims, either as individual or as partnership, so far as the receipt and that other evidence, show it was intended by the parties."

The Court also charged the jury, "that this case had been troublesome and had cost much time and trouble to investigate it, and therefore there should be a verdict."

The complainant excepted to the ruling of the Court refusing to allow the amendment waiving the discovery, to its refusal to allow a recovery for the rents of said real estate, to the aforesaid refusal to charge, and to each of the charges as above set forth.

The jury returned the following verdict: "We, the jury, find for the defendants, and we do further find that the plaintiff pay to Mrs. Martha F. Woodson, executrix of the estate of W. D. Woodson, deceased, the sum of \$1,400 13, with interest from January 11th, 1868, that being the amount paid to the plaintiff by Benjamin Bethel, executor of W. D. Woodson, deceased, acting for Woodson & Redding. We also recommend that the cost of suit be equally divided between the complainant and the defendant."

The complainant moved for a new trial upon each of the aforesaid grounds of exception, and because the verdict was contrary to the evidence. The motion was overruled, and complainant excepted.

B. H. HILL & SON; DOYAL & NUNNALLY; JACKSON & CLARKE, for plaintiff in error.

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J. J. FLOYD ; JOHN P. FORT, for defendants.

McCAY, Judge.

We think most of the argument of the plaintiff in error in this case turns upon their failure to recognize the true nature of their bill, and of what they seek to do. Essentially, the object of this proceeding is to seek an account from the estate of Woodson, of certain assets of Woodson & Bowdre, which, it is charged, came into the hands of Woodson, and remained unaccounted for by him to Bowdre at his, Woodson's, death. The amendment to the bill disclaims all privity between Bowdre and Redding. Redding's estate is only retained in the bill because it is charged that the firm of Woodson & Redding got the benefit of Woodson's misapplications of funds belonging to Woodson & Bowdre. It is, therefore, a *sine qua non* of the complainant's case that Woodson shall be proven to have died indebted to Bowdre on their partnership account. The firm was dissolved in 1859 ; necessarily its assets were large. They had been partners for years, and, from the amount of the stock on hand, the inference is, that their books covered large amounts. What were the terms of the partnership, what they owed, what was due to them, and what were the relations of each partner, on the books, to the concern, does not appear. The evidence is, that each partner took part in the settlement of the affairs. The books, it is true, were kept in the house occupied by the firm of Woodson & Redding, but the evidence is clear that Bowdre had free access to them, and that he engaged himself in settling up the accounts and collecting the debts due. It is very unfair, under the evidence, to say that the assets were in the sole control of Woodson. The inference to the contrary is very strong ; nor does the fact that they were kept at the old store, now occupied by the new firm, alter the case. The parties seem to have remained firm friends, and to have continued to feel mutual confidence ; and the place where the books were kept is just where it was proper to keep them if they were to be open to the free inspection of both parties.

The state of this case is simply this: The firm was dissolved, both parties engaged at pleasure in settling up the affairs of the firm, collecting the assets, and paying the debts; they continued to go on thus until 1863, when the store-house, with their books in it, was burned. These books, doubtless, contained all the materials for a full settlement; in them was entered the account of each man with the firm, what debts he had collected, what debts he had paid, and how he stood in all his relations to the firm. Then came the mutual deed, under seal, executed with great solemnity, and reciting the loss of the books, and with them the impossibility of making an accurate settlement. The plain intent of this deed is to declare that, at that time, each owed the firm nothing, that they were even as to what each had got, at least, measurably so, and they mutually declared and covenanted that the remaining assets of *every kind* belonged equally to both. We think this is the meaning and the sole meaning of the deed, to-wit: to declare that, up to that time they were even, each was chargeable to the other, as to the firm assets, nothing; but what was still on hand of every kind was the joint equal property of both. This, as we understand it, is the whole intent and object of this solemn paper, and its very solemnity is significant of its intent. It means simply this: Our dealings have been large, complicated, and continued through many years. We have lost the only means of a perfectly accurate settlement. We are, as nearly as we can judge, about even. We do, therefore, hereby, under our seals, and before two witnesses, covenant that the past shall be buried, and that we are jointly and equally interested in what remains. There is evidence that subsequently to this they divided a considerable sum of money, giving mutual receipts.

Again, in 1866, just before Woodson's death, they meet again, and the notes given by Woodson to Bowdre for the stock of goods are settled. But how? 1st. The amount due, after taking off the credits, is found. 2d. A memorandum account of Woodson against Bowdre, for articles (some \$2,400,) since the war is taken off. 3d. An account against Bowdre,

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on the books of Woodson & Redding, is taken off. 4th. The balance due (some \$2,500 00) is paid in tobacco, and the receipts of Bowdre is taken, purporting and stating it to be in full of the note, and in full of all demands.

Soon after Woodson dies. Bowdre states to various persons that he has settled with Woodson; that he has taken tobacco for all Woodson owes him; that he has settled every thing except *the lots*, and soon after he also dies.

Independently of the deed, the receipt and the statements of Bowdre, we think the case for the complainants a very weak one. Two men have been in partnership for many years, they dissolve, both engage in settling up the affairs, each, doubtless, receives and pays out large sums; four years after the dissolution the books are destroyed; three years after this both parties die within a few months of each other, friends to the last. And it is now proposed to charge one to the other, because, on looking into the private papers of that one, (as to Bowdre, the books of Woodson & Redding are private), it is discovered that within a year or two after the dissolution he had funds in hand belonging to the firm, and their private books do not show that he accounted for these funds to his partner.

We think this, even without the evidences of settlement, is very inconclusive matter with which to charge Woodson's estate. After ten years have passed since the dissolution, it is proposed to lift up the veil which time and war and fire and death have drawn over the affairs of the firm, and seizing upon but one item, to charge Woodson's estate with that.

At last, the entries in Woodson & Redding's book only prove that at that date Woodson had funds of Woodson & Bowdre in his hands—and they would prove this just as clearly if they were fully balanced—that is, if they showed the sums mentioned had been returned to Woodson & Bowdre; for in the nature of the thing that would only have been returning them to Woodson. But, in our judgment, the fact that Woodson or Bowdre has, at some time since the dissolution of their firm, had money in hand belonging to the firm,

is a very small matter. Whether the money so on hand is unaccounted for ; whether Woodson had or had not a right to use the money for his own purposes, depends on the relations in which he and Bowdre stood towards those assets ; and to know this would require a full inquiry into the whole affair. A partner, even of a dissolved firm, does not own in his own right the half of any particular sum of money, or the half of any particular thing ; his interest is one-half after a full settlement. And it is impossible to say whether Woodson is to account for this money, unless we know the state of accounts between them.

Suppose, in looking into the papers of Bowdre, it were to be found that early in 1860, he had in hand two or three thousand dollars of the money collected from the firm assets, and that he had used it for his own purposes, would that single fact charge his estate? Could the real rights of the two partners as to any particular sum be settled without a full investigation of the whole?

But if to the inconclusiveness of the whole of the complainant's evidence, there be added the solemn deed, the receipts and the sayings of Bowdre, the proof of a settlement of the whole matter by the parties during their lifetime, seems to us conclusive. Nor is the letter written by Woodson to Mrs. Redding seriously in the way of this. At most, it is wholly uncertain as to amounts, but in any event, its language is not inconsistent with the fact that Woodson & Bowdre were even. The original advance of this money to Woodson & Bowdre was really an advance by Woodson. The name of Woodson & Bowdre was only used to keep the accounts separate. And in this letter Woodson, doubtless used the name of Woodson & Bowdre instead of his own name, for the reason that the advance was thus entered on the books, and it would be giving an extraordinary effect to this private communication from Woodson to Mrs. Redding, to accept it as proof that on a full settlement of the affairs of Woodson & Bowdre, any amount, much less any specific amount, was still due to Bowdre.

With this view of the nature of the complainant's case, and with the consideration that it is necessary for them to establish that on a settlement of the affairs of Woodson & Bowdre, Woodson would be in debt to Bowdre, we see no error in the charge of the Court upon the receipts and deed.

The deed has for its sole purpose to declare that, up to that date, the parties are even as to the firm affairs, and though the receipt is in terms only for the balance due on the two notes, yet the mode in which that balance was found, to-wit: by taking off the two accounts—one personal of Woodson against Bowdre, and the other of Woodson and Redding against Bowdre—gives point and significance to the other words, “in full of all demands,” and “on final settlement.” If to this be added Bowdre's subsequent statements, we think it was right in the Judge to refuse to say to the jury that the words, in full of all demands, could not be taken to go beyond the special subject, to-wit: the notes.

So far as the receipt is a contract, it can, it is true, go no further than the consideration then passing, to-wit: the amount taken in discharge of the note. But if the facts justify it, the words, in full of all demands, may justly be taken, not that anything else is then satisfied, but as an acknowledgment that nothing else was then due; and, *prima facie*, we think it has that effect. If anything else is shown to be due, the words do not bar it. But it amounts to an acknowledgment that nothing else is then due. We think, too, in this case, under the facts proven—especially, in view of the fact that the balance due on the note was found by taking off the accounts, as well as the frequent statements by Bowdre—make it pretty clear that it was the intention of the parties, not only to settle the note, but to declare there was nothing else to settle. Is it probable that Bowdre would allow the accounts to go to reduce the note, if Woodson had in his hands money of the firm unaccounted for; or that Bowdre would say he had settled in full with Woodson everything except the lots, if there was money in Woodson's hands unaccounted for?

The effort of the complainant was to open a settlement—two

settlements—one by deed, between the parties, of the matter now in hand, and it was not error in the Court to say that, after the death of both parties, this should not be done on anything but clear evidence. This was not only sound law, but sound sense—nothing but the statement, in another form, of the rule against stale demands, and which is the foundation of the statutes of limitation. If the receipt, with the words, in full of all demands, and the deed, are to be considered as evidence of a settlement of the firm matters, and we think they are, then there can be no good objection to the charge on either of the two points relating thereto.

We think there was error in the Court on the question of the statute of limitations. The rent is only an item of the things intended to be charged against Woodson—only an explanation of the mode in which he converted the assets, and, in that view of it, it stood with the other items. If it is to be considered as a debt actually due on account by Woodson & Redding, then the statute would apply; but if, as we think it may be considered, it is only an itemizing of the mode in which Woodson got hold of and used the assets of Woodson & Bowdre, the statute would not apply.

But in that case it would stand on the same footing as the other items, and if the jury was right in its verdict, this charge did no harm. The money paid to Bowdre's administrator by Woodson's executor was clearly paid by mistake of fact, if Woodson & Bowdre had settled in life. We think the evidence of this is overwhelming, and the two papers found by the administrator were not, in fact, evidence of any debt. Doubtless they thought so, but the jury have found, and we think rightly, that this was a mistake. If so, it ought to be repaid. The payment of it was under a mistake of fact.

Upon the whole we affirm the judgment. Unless these two men were very different people from what they seem, it is a great error to undertake to open the affairs of this firm. To do so would be to charge Mr. Bowdre with great folly and ignorance of his own rights, and Mr. Woodson with great want of good faith to his life-long friend. Nothing in the

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testimony justifies such a charge against either, and a jury having so found we think justice to all parties requires us to leave that finding undisturbed.

As to the refusal of the Judge to allow the complainant to get clear of the effect of the answer by waiving discovery after the answer came in, we think the Judge was right. The Code, section 3101, authorizes a complainant to waive discovery. But this is a very different thing from waiving its effect after he has got it. It seems absurd to say that discovery can be waived after it has been obtained. Had that been the meaning of the Legislature, some different language would have been used. As it is, the complainant may "waive discovery;" to do that he must waive his right to the defendant's answer. What is now proposed is not to waive discovery, not to waive the necessity of an answer, but to waive the effect of the answer after it has been made. This is not what the statute authorizes, and we do not think it can be done.

Judgment affirmed.

JOHN W. CASWELL, plaintiff in error, vs. THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

Where two promissory notes, before due, were delivered to and accepted by an incorporated body invested with banking privileges, as collateral security for a loan of money made by said corporation to the payees of said notes, at a greater rate of interest than seven per cent., the title to the same does not pass, and the maker thereof may plead in bar to a suit thereon in favor of said bank, payment made to the original payees without notice of said assignment.

Banks. Promissory notes. Usury. Before Judge BARTLETT. Putnam Superior Court. March Term, 1873.

For the facts of this case, see the decision.

LAWSON & FITZPATRICK, for plaintiff in error.

W. F. JENKINS; REESE & REESE, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on two promissory notes, for the sum of \$464 69, one dated 2d June, the other 24th June, 1870, payable 1st November after date to Adams, Washburn & Company, or bearer, with a lien on his crop to secure the payment of said notes to them, or bearer, and agreeing in said notes to deliver to them, or bearer, at Savannah, enough of his cotton crop to pay said notes at maturity. The defendant, in his plea to the plaintiff's action, alleged that, without notice of the assignment of said contracts, he, in good faith, and in pursuance of said contracts, did deliver to said Adams, Washburn & Company, at Savannah, enough of his cotton crop of the year aforesaid to pay said sums of money, and all other sums due them, and that said contracts ought now to be extinguished, and that the right of property in, and the right of action on said contracts, is still in the said Adams, Washburn & Company, inasmuch as the plaintiff, being a corporate body, invested with banking privileges, resident in said State, did, on the ... day of, lend to the said Adams, Washburn & Company, an amount of money, as defendant is advised and believes, at a greater rate of interest than seven per cent. per annum, and accepted the contracts aforesaid as collateral security for said loan, which contract of loan, at the rate of interest aforesaid, being contrary to the laws of said State, was null and void, and that the taking of said contracts as collateral security being incidental and dependent on said original transaction, is likewise null and void. At the trial of the case, the plaintiff demurred to the defendant's plea, the Court sustained the demurrer and a verdict was rendered in favor of the plaintiff for the sum of \$468 69, principal, and \$77 89, as interest. The defendant made a motion for a new trial, on the ground that the Court erred in sustaining the demurrer to his plea, and on the other grounds set forth in the motion, which was overruled, and the defendant excepted. The only ground of error insisted on here was in sustaining the demurrer to the defendant's plea.

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The facts alleged in the defendant's plea, and admitted by the demurrer to be true, are, that the defendant did, in pursuance of his contracts with Adams, Washburn & Company, in good faith, and without notice of the assignment thereof to the plaintiff, deliver to them enough of his cotton crop for the year 1870 to pay off and extinguish the same; that the right of property in, and the right of action on, said contract, is still in the said Adams, Washburn & Company, because said contracts were delivered to and accepted by the plaintiff, an incorporated body invested with banking privileges, as collateral security, to secure a loan of money made by the plaintiff to them at a greater rate of interest than seven per cent., and that said contract, by which the plaintiff claims its title to the papers sued on, is null and void, the same being incidental to and dependent on, said original usurious contract.

The question is, whether the plaintiff has a title to the papers sued on, and is such a *bona fide* holder thereof as will defeat the defendant's plea of payment to the original payees thereof, made in good faith, and without knowledge of the transfer at the time of making such payment. The plaintiff, as the holder of the papers as collateral security for the debt contracted for the loan of the money to Adams, Washburn & Company, stands upon the same footing as a purchaser thereof: Code, section 2746. Their title to the papers, therefore, depends on the validity of the contract made between the plaintiff and Adams, Washburn & Company for the loan of the money which the collaterals now sued on were intended to secure.

The question involved in this case is not whether the defendant can set up the usury in the contract between the plaintiff and Adams, Washburn & Company, as a defense against the payment of his own notes, but the question is, whether he cannot show that the contract by which the plaintiff claims to be the *bona fide* holder of the papers as the transferee thereof, is void for usury, and that the title to the notes is still in the payees thereof, to whom the defendant has paid them, so as to enable him to make his defense of payment available.

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This contract was made prior to the repeal of the usury laws in 1873. By the provisions of the Code, when this contract was made, the banks of this State were expressly prohibited from loaning money, directly or indirectly, on any note, bill, draft, or contract of any sort, at a greater rate of interest than seven per cent. per annum, or to discount or purchase any paper, or debt, at a greater discount than said rate, and every contract, note, bill, draft, or paper made in violation thereof, is declared to be null and void: Code, 1478, 1480. This was the declared policy of the State as to usurious contracts made by banks, at the time of the making of the alleged usurious contract by the plaintiff. The 2025th section of the Code declares, that "All titles to property made as a part of an usurious contract, or to evade the laws against usury are void." A contract to do an illegal thing is void, and a contract which is against the policy of the law, cannot be enforced: Code, 2707, 2708. If the facts alleged in the defendant's plea be true, the plaintiff is not a *bona fide* holder of the notes sued on in the fair course of trade, but the title to the notes is still in the payees thereof, the contract by which the plaintiff obtained the possession and title thereto being usurious, was void, and the defendant may plead and prove that fact so as to protect himself in making the payment to the payees of the notes in good faith, who were the legal owners thereof; in other words, the defendant may plead and prove in defense of the plaintiff's action, that it is not a *bona fide* holder of the notes, and has no title thereto under the law, but that the title to the notes was in Adams, Washburn & Company, to whom he paid them, notwithstanding the plaintiff may have obtained possession of the notes by delivery, before due, under and in pursuance of the alleged usurious contract. This question is controlled by the positive declaration of the statute making usurious contracts by the banks void, and not by the general principles of the common law applicable to such contracts. This case comes within the principle decided by the Supreme Court of the United States, in *Gaither vs. The Farmers' & Merchants' Bank of Georgetown*, 1 Peters'

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Caswell vs. The Central Railroad and Banking Company.

Reports, 37. In that case the bank brought suit against Gaither on a note deposited by Corcoran & Company, before it became due, as collateral security for notes discounted by the bank for them at usurious rates of interest. The defendant Gaither proposed and offered to set off the notes of Corcoran & Company, which had been transferred to him by the payee thereof, after the note on which the suit was brought had been transferred to the bank, but before the suit was brought, and the question was, whether the defendant Gaither could set off the notes which he had purchased on Corcoran & Company, who were the payees of his note, against the bank. The Court held that he could, on the ground that, by the laws of Maryland, usurious contracts were void, that the transfer of Gaither's note by Corcoran & Company to the bank, as collateral security for an usurious contract, was void, and that neither the property in the note, nor the right of action thereon, were passed to the plaintiff.

So in this case, if the contract between the Central Railroad and Banking Company and Adams, Washburn & Company, by which the former acquired its title to the notes sued on, was an usurious, void contract under the statute, the transfer of the notes by Adams, Washburn & Company to the plaintiff under that contract, passed no title to the notes, or right of action thereon, and the defendant could plead payment of the notes to Adams, Washburn & Company, who were the rightful owners thereof at the time of the alleged payment by him of the notes now sued on. The Court below erred in sustaining the demurrer to the defendant's plea.

Let the judgment of the Court below be reversed.

McCAY, Judge, concurring.

I concur in the judgment in this case, with some hesitation. The general rule, as it seems to me, as established by the decided current of the authorities is, that the maker of a note cannot, if the note was valid when given, object to the plaintiff's title to it, on the ground that he acquired it in an illegal transaction, and especially is this true if the illegality alleged,

be usury, since it is not the province of the maker to protect the payee or indorser against the oppression of the holder. But as this case presents itself, the maker has a good defense to the note. He has fully paid it to the payee. He has discharged the contract between himself and the party to whom the note was made. The present holder has a right to make him pay it again, alone on the principle that he is an innocent holder, that he has in good faith been misled, to his injury, by the face of the note. Can one place himself in this favored position by an act, which the law, for purposes of public policy, declares absolutely void? Our Legislature, in its wisdom, has declared that no bank shall, directly or indirectly, loan money at more than seven per cent. or *discount or purchase paper or debts at a greater discount than said rate*: Irwin's Code, section 1480. And that every contract, note, bill, draft or paper, made in violation of this provision, shall be null and void. Evidently this provision has more in it than the ordinary law, as to usury by individuals, which merely makes illegal interest not recoverable. The intent is to prevent banks, having special privileges granted by charter, having franchises bestowed by the State, for the public good, abusing their franchises to the public injury. The act of taking usury, by a bank, is an illegality, and any contract in violation of this is declared null and void. As I have said, it is assuming a great deal to ask that one shall be entitled to place himself in the position of a *bona fide* holder—an innocent purchaser—by an illegal and void act; an act directly in the teeth of the statute which was intended to prevent banks from misusing their franchises.

It is asked that the defendant shall pay a sum of money he does not justly owe, because he has negligently permitted this bank to become the innocent holder of his note, when the fact is, that, in becoming such holder, the bank violated the law. The defendant must pay again, because the bank has innocently made a contract which the law declares null and void. This view of the matter strikes my mind with much force, and upon it I concur.

 Boit & McKenzie vs. Whitehead *et al.*

BOIT & MCKENZIE, plaintiffs in error, vs. Z. T. WHITEHEAD
et al. defendants in error.

The plaintiffs were the agents of a manufacturer of guano, and as such, by their local agent, sold to the defendant a lot of guano, and warranted the same to be a good fertilizer, taking a note for the price, payable to themselves. Afterwards, before the note became due, they became the real owners of the note, by arrangement between themselves and the manufacturers :

Held, That the plaintiffs were not such *bona fide* purchasers without notice, of defendant's note, as that defendant could not set up as a plea that the guano was of no value, even though it be not proven that plaintiffs knew it to be of no value at the time they became the real owners of the note.

Promissory notes. Principal and agent. Before Judge HILL.
 Houston Superior Court. May Term, 1873.

Boit & McKenzie brought complaint against Z. T. Whitehead, as principal, and S. W. J. Harris, as security, for \$360 20, and \$36 02, counsel fees, besides interest on the following instrument:

"\$260 20. "FORT VALLEY, May 3d, 1871.

"For value received, we promise to pay, on or before the 10th of November, 1871, to the order of Boit & McKenzie, at their office in Savannah, Georgia, the sum of \$360 20, for six tons of sea-fowl guano, furnished to enable us to carry on our business of planting in Houston county, Georgia.

* * * * *

"Z. T. WHITEHEAD,

"S. W. J. HARRIS, security."

The defendants pleaded failure of consideration, and asked judgment in their favor for \$62 40, expended by the defendant, Whitehead, in freight, drayage, and in applying said guano to his land.

The plaintiffs introduced the note sued on, with their indorsement thereon.

They testified that they acted in the sale of said fertilizer as the general agents of W. S. Bradley, manufacturer, and, as such, sold the guano to the defendants. That in August, 1871, they bought the note from W. S. Bradley. That at the time of the making of the note, and at the time of their purchase of the same, they knew of no defect, latent or otherwise, in the guano.

The plaintiffs then moved to strike the pleas of the defendants, as they failed to show that they were not *bona fide* purchasers without notice of said note. The motion was overruled, and plaintiffs excepted.

Much testimony was introduced by the defendants as to the worthlessness of the guano, the seasons, etc., unnecessary to be here set forth.

The jury returned a verdict for the defendants. The plaintiffs made a motion for a new trial because of error in the aforesaid refusal to strike the pleas of the defendant, and because of the refusal of the Court to charge the jury as follows:

"That if the note sued on had been transferred by indorsement, before due, and plaintiffs had bought the same in good faith and for a valuable consideration, without any notice of any defect, latent or otherwise, in the guano, or of any defense of defendants to said note, then, under the pleadings, the failure of the consideration could not be set up."

The motion was overruled, and plaintiffs accepted.

DUNCAN & MILLER, by brief, for plaintiffs in error.

WARREN & GRICE, by brief, for defendants.

MCCAY, Judge.

The plaintiffs were the original payees of the note. True, as it seems, they were not, in fact, the owners, and yet it was with them, in their own name, that the defendant contracted. We think it very far-fetched to set up that they are innocent purchasers. They bought with their eyes open; they knew what the note was given for; they knew there was an express

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warranty; they were the agents, according to their own showing, in the whole matter, and in taking the note they contracted in their own name. They must take the fate of their principal. We can hardly see, even if the note was not payable to the plaintiffs, they could be innocent purchasers, since the defendant has nothing to do with the manufacturer, except through them. They were the means by which the defendants were imposed on, if they were imposed on. We think the plaintiffs too clearly mixed up with the sale and warranty, and with the note itself, to become innocent holders of the note. They are charged with the duty to see to it that the warranty made by themselves has not failed.

We see no error in the charge or verdict. True, it is not conclusive of a bad article that it did no good in a particular case, nor is it conclusive of a good article that another lot of the same brand is good. It is, in each case, a question of fact, to be determined by the jury, as other facts, from the proof. The evidence in this case seems very strong that this was a bad article. Even the agent could see no difference. If the guano is properly used, and the season is not such as to destroy the effect, it would seem that if there is a failure to get any benefit, there is pretty strong proof of a bad article.

Whilst we have no sympathy with a defendant who sets up his own mismanagement or the influence of the season against the payment of a just debt for manure, we have as little for those who impose their worthless dirt upon the honest farmer, who, if the article be bad, not only fails to get benefit, but loses his pains and labor of hauling and distributing an inert substance.

Judgment affirmed.

Taylor vs. The State of Georgia.

PLATT TAYLOR, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

On the trial of an indictment for an assault with intent to commit rape, it appeared that the defendant, "early in the night, soon after dark," entered the house where there was but one room, and where the father, mother and three sisters, aged respectively nineteen, seventeen and eleven years, were in bed, approached the bed in which the oldest and youngest sisters were lying, pulled down the cover and put his hand on the lower portion of the person of the oldest sister; that she gave the alarm instantly, and the defendant immediately fled from the house. Counsel for defendant requested the Court to charge the jury, that if the prisoner went there with the intent to desist as soon as he found out that the woman would not consent, he is not guilty of the charge, and the jury will so find:

Held, That the request was a proper one, under the facts in evidence, and should have been given by the Court in his charge to the jury.

Criminal law. Assault with intent to commit rape. Charge of Court. Before Judge STROZER. Terrell Superior Court. May Term, 1873.

Platt Taylor was placed on trial for the offense of an assault with intent to commit rape, alleged to have been perpetrated upon the person of one Catharine Turner, on June 15th, 1872. The defendant pleaded not guilty. The evidence made the following case:

Catharine Turner, about nineteen years of age, her two younger sisters of the respective ages of seventeen and eleven years, and their father and mother, occupied the same room; Catharine and the youngest slept in the same bed. Early in the night of the day on which the offense is charged to have been committed, about one hour after dark, the defendant was seen approaching the house in which Catharine Turner lived, but for some reason turned away and went towards his own home, which was some two hundred yards distant. In about ten or fifteen minutes he returned and entered the room, there being but one in the house, approached the bed in which Catharine and her youngest sister were lying, threw the cover off of Catharine and touched her upon the lower portion of her

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person. She gave the alarm instantly and he escaped through the door, but not before he was recognized. The defendant had never been at the house but once before, which was about one month previous to the alleged offense, on a Sunday afternoon.

The defendant requested the Court to charge the jury, "that if the defendant went there with the intent to desist as soon as he found that the woman would not consent, then he is not guilty of the charge, and the jury will so find."

The Court refused so to charge, and the defendant excepted.

The jury found the defendant guilty; whereupon, he moved for a new trial, on the ground of error in the above refusal to charge. The motion was overruled, and the defendant excepted.

C. B. WOOTEN; F. M. HARPER, by R. H. CLARK, for plaintiff in error.

JAMES T. FLEWELLEN, Solicitor General, by H. & I. L. FIELDER; W. G. PARKS, for the State.

TRIPPE, Judge.

The defendant entered the house "soon after dark," as the witness expressed it, where the father and mother and three daughters were. There was but one room to the house. No violence was used, excepting removing the bed clothes and putting his hand on the person of the woman. She immediately cried out, and defendant fled.

Under these facts, a refusal to give the charge requested was equivalent to refusing to allow the jury to consider any other intention than that of ravishing the person touched. Such an intention must exist, and the jury must so find, before they can render a verdict of guilty. All that the defendant did are facts which go to show the intention. The jury had the right, and it was their duty to consider those acts. We do not mean to say that, with the charge as requested, the jury should have acquitted the defendant or found him guilty of a less

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offense. But the question of defendant's desisting and fleeing the house at once, on the first appearance of resistance, is certainly a matter that should have been left to the jury for what it was worth. The rejection of the request by the Court operated as a denial to the defendant of the right to have all he did considered by the jury in determining the question of intention.

If the defendant did, in fact, intend forcibly to know a female carnally, and against her will, and the effort be made to accomplish his purpose, the mere desisting from further effort, on account of resistance, inability to overcome the resistance, or from fear, does not relieve him from the guilt of an assault with intent to rape: *Lewis vs. The State*, 35 Ala., 380; 4 Leigh's (Va.) R., 648; 7 C. & P., 318. But the whole question of intention, and all the facts that throw light upon it, should be submitted fully to those who alone can decide it.

Judgment reversed.

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112	209

THOMAS E. CHAMBLISS, guardian, plaintiff in error, vs. EDWIN T. JORDAN, defendant in error.

This case comes within the principle of the case of *Gunn vs. Barry*, decided by the Supreme Court of the United States, and the judgment is therefore reversed.

Homestead. Constitutional law. Before Judge HILL. Crawford Superior Court. March Term, 1873.

The sole question involved in this case was as to the constitutionality of the Homestead Act of 1868, as against antecedent debts. The Court below held it constitutional, and plaintiff in error excepted.

J. S. PINCKARD, for plaintiff in error.

No appearance for defendant.

Eagle and Phoenix Company *vs.* White, Sheffield & Company.

MCCAY, Judge.

This case is settled by the decision of the Supreme Court of the United States, in the case of *Gunn vs. Barry*. The homestead, under the Act of 1868, is not good against a debt contracted before the passage of the Act. The judgment must be reversed. The debtor is entitled to his homestead, but it is subject to the caveator's debt as it is to other debts contracted before the 21st of July, 1868.

Judgment reversed.

EAGLE AND PHOENIX MANUFACTURING COMPANY, plaintiff
in error, *vs.* WHITE, SHEFFIELD & COMPANY, defendants
in error.

When judgment in attachment was rendered against the defendant, but pending the motion to enter judgment against the garnishee, the cause was, on motion of plaintiff's attorney, ordered to be removed to the Circuit Court of the United States, and subsequently the plaintiff sued out a process of garnishment at common law upon said judgment, to which an answer was filed which was traversed, and upon the trial of the issue thus formed a motion was made to dismiss the second garnishment proceedings on the ground that the judgment against the defendant had been carried to the Circuit Court of the United States, and therefore garnishment process could not issue from it, and because there had already been one process of garnishment issued to recover the same debt, whereupon plaintiff's attorney submitted his affidavit to the effect that the Circuit Court had refused to take jurisdiction of said case because the records were not filed on the first day of the Court: *Held*, That the motion was properly overruled.

United States Court. Garnishment. Jurisdiction. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

For the facts of this case, see the decision. ●

PEABODY & BRANNON; HENRY L. BENNING, for plaintiff
in error.

R. J. MOSES, for defendants.

WARNER, Chief Justice.

This was an issue formed upon a traverse of the answer of the Eagle and Phoenix Manufacturing Company, as garnishee of the Rock Island Paper Mills.

It appeared from the evidence that White, Sheffield & Company, on the 29th of March, 1867, sued out an attachment against the Rock Island Paper Mills, returnable to May term, 1867, of Muscogee Superior Court, and that the Eagle and Phoenix Manufacturing Company was served with summons of garnishment on the same day. A declaration was filed in said case, returnable to May term, 1867, of said Court, and judgment rendered against said Rock Island Paper Mills at November term, 1870, in favor of the plaintiffs, for the principal sum of \$2,397 14, and \$741 00, interest to judgment. To this garnishment the Eagle and Phoenix Manufacturing Company filed an answer at the return term of the attachment. This answer set forth that the garnishee had purchased from the Rock Island Paper Mills Company a lot of land at the price of \$7,000 00, and that \$1,000 00 had been paid in cash, and \$647 45 in an account against said paper mills, and that the remainder was to be paid when good titles to said lot should be made, and that such title had not been made at the filing of the answer.

No traverse was filed to this answer. Afterwards, the following order was made in said case: "In the above case, plaintiffs in garnishment moved for judgment against the garnishees, when counsel for Rock Island Paper Mills objected to the plaintiff's proceeding in said garnishment, because the judgment against the Rock Island Paper Mills Company was founded on a debt anterior to the 1st June, 1865, and no affidavit had been filed that taxes had been paid. The same objection was made by the attorneys for garnishees, and during the pendency of said motion, plaintiff in garnishment moved to remove said cause; whereupon, it was ordered by the Court that the same be removed, as prayed for, to the Circuit Court of the United States for the Southern District of Georgia."

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Afterwards, and on the 4th of May, 1872, said White, Sheffield & Company sued out a garnishment at common law upon the aforesaid judgment, which was returnable to May term, 1872, of said Muscogee Superior Court, and the Eagle and Phoenix Manufacturing Company was served with summons of garnishment on the same day.

At the return term of said garnishment, the said garnishee filed an answer setting forth that said garnishee was indebted to the Rock Island Paper Mills in the sum of \$5,352 55, balance due for purchase of lot number fourteen, and further, that two other garnishments have been issued of the same date: one in favor of Todd & Rafferty, and the other in favor of Bagley & Sewell, both against said Rock Island Paper Mills, and summons served upon the garnishee, to which the garnishee had filed similar answers. To this answer the plaintiff filed a traverse, at the same term, alleging that the garnishee was indebted \$10,000 00.

At the next November term, 1872, the garnishee filed an amended answer. In this the garnishee set out that the plaintiff had issued an attachment in 1867 and served the garnishee with summons, and at the same time Todd & Rafferty, Bagley & Sewell and Petty & Sawyer, each issued an attachment and served the garnishee with summons, all returnable to the same Court. That answers were filed in each case, and that each of the parties, except Petty & Sawyer, had removed their cases to the Circuit Court. That the balance due for the lot was to be paid when titles were made, and that titles had been made in 1867. The total amount claimed to be due by said several plaintiffs from said paper mills, was more than the balance due by the garnishee; that garnishee was ready and willing, on the day of making the titles, to pay the balance due, and would have done so but for said garnishments, and has always been willing and ready to pay the same, but has not done so on account of the garnishments. Said garnishments were pending in said Circuit Court until the term of said Court held last, before the service of the second summons issued under the garnishment at common

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law, and at the time of said second service this balance was still due. At the same time the second summons was served, the said Todd & Rafferty and Bagley & Sewell, also served the garnishee with summonses of garnishment to answer at the same term, and that the total amount claimed by all the plaintiffs against the paper mills was larger than the balance due by the garnishees. Plaintiff also traversed the answer and set forth that the garnishee was indebted \$6,000 00, besides interest, for that the garnishee did resist and delay said garnishments, and have constantly used said money in their business. It was shown by G. Gunby Jordan, who was book-keeper of the Eagle and Phoenix Manufacturing Company, that the amount due for the lot had not been set apart by the garnishee but had remained in its hands; that the garnishees had frequently borrowed money and paid large sums for interest. Did not always have on hand enough money to pay for the lot, but could have paid the amount at any time. Did not pay it because of the garnishments. After reading the order transferring said case to the Circuit Court the garnishee moved to dismiss the garnishment at common law, upon two grounds: 1st, Because said order not only carried the proceedings in garnishment but also the judgment in favor of plaintiffs against the Rock Island Paper Mills, and, therefore, at the time of issuing said garnishment at common law, there was no judgment against said Rock Island Paper Mill; 2d. Because there was, at the time of the issuing the garnishment at common law, another garnishment in favor of the plaintiffs against the garnishee to recover the same debt. After this motion was made to the Court the attorney for the plaintiffs, to-wit: R. J. Moses, without objection from the garnishee, presented and read to the Court, but did not offer the same in evidence to the jury, an affidavit made by himself in open Court at that time, stating in said affidavit, that the said Circuit Court refused to take jurisdiction of said cases so transferred to said Court, because the records in said case were not filed in said Court on the first day of the said Court, but said Court remanded the same to the Superior Court of Muscogee.

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The Court overruled the motion to dismiss, and this is the first error assigned.

It appears from the evidence that the Rock Island Paper Mills made a deed to the garnishee, which was accepted, in 1867, and that the garnishee had never paid the money into Court, and that the garnishee resisted the payment on the ground of the statute of limitations. The Court charged the jury that they should find what amount the garnishees owed to said paper mills company, and further, that they should ascertain when said money became due, that they might find interest against the garnishee upon the same from the time the same became due. This last charge was excepted to by the garnishee, and is the second error assigned. The jury found that the garnishee was indebted \$5,305 75, principal, and \$1,757 01, interest. After the rendition of the verdict, the Court gave judgment in favor of the plaintiff against the garnishee for the full amount of the principal and interest of plaintiff's judgment against the Rock Island Paper Mills Company, to which judgment the garnishee excepts, and this is the third and last ground of error assigned.

It was not error in the Court in refusing to dismiss the garnishment on either of the grounds stated in the motion. First, because it did not affirmatively appear that the Circuit Court had ever acquired jurisdiction of the garnishment proceeding, and as the case was back in the Superior Court at the time the motion to dismiss was made, we are bound to presume it was rightly back there, notwithstanding an order may have been granted to remove it at a previous term of the Court; besides, the removal of the garnishment proceeding to the Circuit Court would not necessarily have removed the common law judgment to that Court. Second, because the affidavit of the garnishee alleging there was, at the time of the issuing of the garnishment at common law, another garnishment in favor of the plaintiffs against the garnishee to recover the same debt, if it is to be considered in the nature of a plea in abatement, it was not filed at the first term of the Court after service of the summons of garnishment; besides, there is no allegation

in the affidavit that there was another garnishment *pending in any Court* at the time of issuing the garnishment at common law; therefore, the motion to dismiss was properly overruled. The question of interest was immaterial, so far as the garnishee is concerned, for it admits it is indebted to the defendant more than sufficient to pay both the principal and interest found by the verdict. When the garnishee pays what it admits it owes to the defendant, into Court, it need not trouble itself about the distribution of the money between the other creditors of defendant.

Let the judgment of the Court below be affirmed.

JOHN M. TISON, plaintiff in error, vs. BAILLIE FORRESTER,
defendant in error.

An acknowledgement of service, and waiver of further service, by counsel for defendant in error, on the bill of exceptions, dated anterior to the certificate of the Judge, is not a valid service. (R.)

Bill of exceptions. Service. Practice before the Supreme Court. Before the Supreme Court. July Term, 1873.

When this case was called, a motion was made by the defendant to dismiss the writ of error upon the ground that there never had been valid service made of the bill of exceptions. The entries upon this paper showed that it was certified by the Judge, on September 20th, 1873, whilst on the nineteenth of the same month, (the preceding day,) was entered thereon an acknowledgement of service and waiver of further service, signed by counsel for defendant.

The motion was sustained and the writ of error dismissed.

J. D. RUMPH, by Z. D. HARRISON, for plaintiff in error.

A. J. SMITH, by JACKSON & CLARKE, for defendant.

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102	578

Scogin vs. Beall.

JOSEPH SCOGIN, plaintiff in error vs. JEREMIAH BEALL,
executor, defendant in error. .

Where an affidavit of illegality was filed to an execution and the issue was pending and the Judge dismissed the "case and levy for want of prosecution," and the plaintiff attempted, afterwards, to proceed upon the same levy :

Held, That the levy was dismissed, and equity will enjoin the plaintiff from proceeding in defiance of the judgment of the Court.

Equity. Illegality. Before Judge BARTLETT. Baldwin county. At Chambers, October 19th, 1873.

John Scogin, Joseph Scogin and Eliza Scogin gave their note to William Sanford for the purchase money of a slave, dated January 3d, 1865, and due January 1st, 1857. Beall, executor of Sanford, sued and obtained judgment on this note against Joseph Scogin and Eliza Scogin at the August term, 1866, of Baldwin Superior Court.

In December, 1868, an execution was levied on land of Joseph Scogin, who thereupon filed his affidavit of illegality.

At the August term, 1872, the plaintiff in *fi. fa.* being unrepresented, the Court sustained the illegality, and dismissed the levy, as follows : "Levy and case dismissed for want of prosecution." Notwithstanding the judgment of the Court sustaining the illegality, the sheriff advertised the land to be sold on the first Tuesday in June, under the levy made in December, 1868. Thereupon L. H. Briscoe, attorney at law for defendant in *fi. fa.*, gave notice to the sheriff of the foregoing facts by affidavit, which affidavit the sheriff returned to the August term, 1873. At this term the Court dismissed Briscoe's affidavit and ordered the *fi. fa.* to proceed. Briscoe was absent during the whole of this term, because of sickness, a fact known to the Court when the order dismissing his affidavit was allowed. The land being again advertised by the sheriff, Joseph Scogins presented his bill to the Chancellor, setting forth the above facts, and praying an injunction.

The answer of the defendant set up that no judgment was obtained in the suit set forth in the bill, against John Scogin

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because of his death, but that defendant commenced suit against Joseph Scogin, as administrator of John Scogin, deceased, to the February term, 1868, of Baldwin Superior Court, upon the same note, and in November, 1871, the administrator filed a plea to the jurisdiction of the Court on the ground that the consideration of said note was the purchase of a slave, which resulted in the following entry being made upon said writ: "Dismissed for want of prosecution, November 10th, 1871;" that complainant has confounded this case with the one at bar; that defendant knows nothing of the levy and case being dismissed, but charges the contrary to be true, as will appear from the execution, upon which the levy stands undisposed of; that defendant has not heretofore prosecuted said levy to fruition, for the reasons that he was inhibited from so doing by the Constitution of 1868, it being for a slave debt.

The injunction was refused and the complainant excepted.

L. H. BRISCOE, by Z. D. HARRISON, for plaintiff in error.

CRAWFORD & WILLIAMSON, for defendant.

McCAY, Judge.

As we understand the record in this case, the complainant was entitled to have the defendant enjoined from proceeding to sell under the levy made in December, 1868. That levy was dismissed by the judgment of the Court at August term, 1872, as appears by the minutes of the Court, for want of prosecution of the proceedings then in Court. The plaintiff in *fi. fa.* was in *laches*. The effect, and the only effect of the order was to dismiss the levy; with that fell, as a matter of course, the defendant's affidavit. The plaintiff now proposes to go on with his levy and sell the property levied on. This is in *defiance* of the judgment. Why make another affidavit of illegality? If the plaintiff refuses to obey one judgment, may he not another? Has not the defendant exhausted the law?

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 Burney vs. Collins.

He has got a judgment of the Court dismissing the levy, and yet the plaintiff perseveres. Equity is his only sure remedy. But it is said that Mr. Briscoe, the attorney of the defendant, did, in his name, make a second affidavit, and that the Court dismissed that affidavit. The dismissal of the affidavit for irregularity is not a judgment on the merits—is not *res adjudicata* of the dispute. It may, under our practice, prevent a second affidavit; and perhaps, for this very reason, equity would interfere. But it is stated in the bill, and is not denied, that Mr. Briscoe was detained, providentially, from Court, and that the proceeding was dismissed during his absence. Why does not this give the right to seek an injunction. No opportunity has since occurred to move again, on the ground of his sickness, and the plaintiff will have sold before the next session of the Court.

We do not, at present, see that any great harm can come from proceeding under the old levy. It may, however, make a difference, for reasons which the record does not show. It is enough that it is illegal.

Judgment reversed.

JOHN F. BURNEY, plaintiff in error, vs. ALDRIDGE COLLINS,
defendant in error.

Where service of the bill of exceptions is made by the attorney for the plaintiff in error, it must be authenticated by his affidavit made at the time of the service and attached to the bill of exceptions. (R.)

Bill of exceptions. Service. Practice in the Supreme Court. Before the Supreme Court. July Term, 1873.

When this case was called, counsel for defendant moved to dismiss the writ of error, for want of service of the bill of exceptions. The only evidence of service relied upon by counsel for plaintiff in error, was an entry signed by "F.

Wadsworth, Williams & Company vs. Duke.

Chambers." It was stated that F. Chambers was of counsel for plaintiff in error.

The motion was sustained and the writ of error dismissed.

W. A. LOFTON, for plaintiff in error.

JAMES C. BOWER, by Z. D. HARRISON, for defendant.

WADSWORTH, WILLIAMS & COMPANY, plaintiffs in error, vs.
JEREMIAH F. DUKE, defendant in error.

WADSWORTH, WILLIAMS & COMPANY, plaintiffs in error, vs.
JAMES DUKE, defendant in error.

1. One engaged in selling and delivering wood to the proprietor of a mill at so much per cord, is not an employee of the proprietor, so as to put him in the situation of one who takes the risk upon himself of negligence in those running the mill.
2. The verdict in neither of these cases is contrary to the evidence, or so excessive as to require the Court to interfere.

Master and servant. Damages. New trial. Before Judge HARVEY. Floyd Superior Court. July Adjourned Term, 1872.

These two cases, involving the same questions, were argued and decided together.

Jeremiah F. Duke brought case against Wadsworth, Williams & Company for \$3,000 00 damages. He alleged in his declaration that defendants were the owners of a certain steam boiler engine and other machinery, and were using and running the same in connection with a flouring mill in the city of Rome; that they neglected the proper care and inspection of said machinery and allowed it to become unsafe, and were negligent and careless in the management of the same, by reason whereof the boiler exploded and injured and damaged the plaintiff.

James Duke claimed \$2,000 00 damages, alleged to have

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been sustained by the loss of the services of Jeremiah F. Duke, his son, who was a minor; and also for injuries inflicted on two horses and a wagon, the property of plaintiff. The averments as to the negligence, etc., of the defendants were the same as in the case first above stated.

The defendants pleaded not guilty.

The evidence showed that James Duke had contracted to sell cord wood to defendants, and to deliver the same at their mill in Rome; that Jeremiah F. Duke, his son, a boy of about sixteen years of age, was at the mill with a load of said wood at the time of the explosion of defendant's boiler, and was very seriously injured; that he suffered intense pain from the scalding he received and lost much time; that he was making \$3 00 per day, "clear," hauling wood; that a mare hitched to the wagon and the wagon itself were both damaged; that James Duke was old and decrepit and unable to do any work.

The jury found for Jeremiah F. Duke, \$1,000 00, and for James Duke, \$500 00.

The defendants moved for a new trial in said cases because the verdicts were contrary to the law and the evidence, and excessive in amount. The motions were overruled and defendants excepted.

ALEXANDER & WRIGHT, for plaintiffs in error.

WRIGHT & FEATHERSTON, for defendants.

McCAY, Judge.

1. It would be pushing the idea of master and servant very far to say that the plaintiff in this case was in the service of the defendant, or that he stood in any relation analagous. We have taken some pains to search after cases, and we have not found one where the relation has been held to arise in a case like this. The cases are, many of them, collected in Shearman & Redfield, and in all of them the relation of employer and employee, in its ordinary sense, existed. The plaintiff here, was, by his own servant—his son—delivering wood to the de-

fendants by the load or cord—selling it, just as he might have been bringing him and selling to him butter, meat, corn, or any other article of trade; and he stood towards the defendants precisely as any other man stood who, in consequence of his business wants, had occasion to visit the mill.

2. As to the amount of the verdict, we do not think the jury have so far exceeded the limit as to show passion or prejudice. The permanent injury to the young man may not be very great, though, from the testimony of the physician, one cannot but feel that the effect of this accident may, at any time, prove very serious, whilst the pain and terror already suffered are, in themselves, no small matter. At first, we were rather dubious whether the verdict for the father could be so well defended; but, on further consideration, we think it may. The loss of his horse, the injury to the wagon, the loss of the son's service while laid up, and the expense of taking care of him and of the horse, are not all his injury. If the doctor is right, the son may, at any time, be again prostrate from the effect of his injury, and new loss and new expense come to the father. Upon the whole, we do not feel authorized to say the verdict is excessive. Upon the general question, whilst we have no idea, as we suppose the jury had none, that the defendants were not as much astonished and shocked by this explosion as anybody else, yet that is not a complete reply to the plaintiff's action. Good faith and good intentions—the absence of willful neglect, does not excuse from damages a man who puts the lives and the limbs of the community in danger by setting up in its midst a dangerous machine. To say the least of it, he is bound to have his machine up to the highest point of the art, and to have it managed by a skillful man, and one acquainted with the nature of it, and the character of the dangers attaching to the use of it. Though there is some conflict in the evidence, yet, it seems to us that the defendants have not brought themselves within this rule. It was not the act of very prudent men to set up in the community such a boiler, and have it in such charge. We cannot feel that the evidence of want of due

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care is so weak as to justify a Court in saying that the jury could not fairly have found for the plaintiffs. True, Mr. Stewart is not shown to be a boiler maker, but he has had some experience, and we cannot feel that the jury were not justified in considering the defendants in fault for not heeding his warnings.

Judgment affirmed.

JOSEPH GLENN, plaintiff in error, vs. JOHN HILL, defendant in error.

Whilst a libel for divorce in favor of the wife is pending, an action against the husband for the counsel fees of the wife in the divorce suit cannot be maintained in a Justice Court. Such a claim is an incident to the wife's right to temporary alimony, and during the pendency of the libel is only cognizable by the Judge of the Superior Court.

Divorce. Alimony. Attorney's fees. Before Judge McCUTCHEN. Whitfield Superior Court. April Term, 1873.

Glenn brought suit against Hill, in the Justice Court for the eight hundred and seventy-second district, on an account for \$50 00, for professional services as an attorney at law, alleged to have been rendered to Fannie Hill, the wife of the defendant, in the case of said Fannie Hill against the defendant, the same being an action for a divorce, still pending in Whitfield Superior Court. The presiding magistrate dismissed the suit for want of jurisdiction in his Court. The plaintiff carried the case, by writ of *certiorari*, to the Superior Court, where the judgment of the magistrate was affirmed.

To this ruling the plaintiff excepted.

JESSE A. GLENN, for plaintiff in error.

JOHNSON & McCAMY; SHUMATE & WILLIAMSON, for defendant.

TRIPPE, Judge.

Pending an action for divorce, temporary alimony for the wife, *including expenses of litigation*, may be granted by the Judge of the Superior Court: New Code, sec. 1737. In fixing the amount of alimony, the Judge may inquire into the cause and circumstances of the separation rendering the alimony necessary, and in his discretion may refuse it altogether: Code, sec. 1740. Thus, temporary alimony, and, of course, the counsel fees for the wife, are not, as a matter of absolute right, to be granted. They are, by law, in the discretion of the Judge of the Superior Court. Whilst the libel is pending, they are incidents to it, and can only be determined by one tribunal. If an action could be maintained by the wife's counsel against the husband for their compensation in the Justice's Court, whilst the suit is pending for divorce, a singular anomaly would be presented. The Superior Court alone has jurisdiction of divorce cases. The Judge of that Court may grant temporary alimony. This, as stated, covers the question of counsel fees. The Judge, in determining whether he will allow any, may make inquiry into certain facts and circumstances touching the separation and necessity for the alimony, and also, by section 1738, into other matters. If there be rules for the Judge of the Superior Court, they should be observed by any tribunal who may hear the question. They would be obligatory on, or authority for, the Justice of the Peace. The law would not furnish him one rule of action and a different one for the Judge of the Superior Court. Whilst then the one tribunal would be determining one branch of a case over which it has exclusive jurisdiction, another tribunal would be passing upon another branch of the same case, and, indirectly, the question of alimony be heard and adjudged in a Justice's Court.

We think the proper and only consistent rule is, that whilst an action for a divorce is pending, the question of fees for counsel for the wife is a legal incident of the suit, and so far a part of it as to be cognizable only by the authority that has

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jurisdiction of the main question. If, in disregard of any right the counsel may have, the parties (the husband and wife,) adjust their quarrel, condone and dismiss the suit, a different question would be presented. If the counsel have just ground to claim compensation, the law would furnish the remedy. As the divorce suit would be at an end, and, consequently, the matter of alimony concluded, and no recourse through that means for counsel fees, the right could only be asserted by an ordinary action at law. Such is the ground upon which the decision in *Sprayberry vs. Merk*, 30 Georgia, 81, may be fully defended, and such is the difference between that case and this.

Judgment affirmed.

HILORY B. FRAZER, plaintiff in error vs. JOSIAH SIBLEY et al., executors, defendants in error.

1. When a suit was brought against Robert Campbell as a stockholder in a corporation, on his statutory liability for a debt due by the corporation, and the process was returned served by the sheriff thus: "Served the within by leaving a copy at the residence of Robert Campbell," and the defendant not appearing, a verdict and judgment was taken against Robert Campbell, and an execution for the same being levied on the property of Robert Campbell, he filed his bill in equity, alleging that he never had been a stockholder in said company, but that there was another Robert Campbell of the county who was such stockholder, and alleging further that he had no notice of said suit, and that if a copy was left at his residence he did not get it, or have any knowledge of it, and praying that the judgment should be enjoined against him. On the trial it was proven by the sheriff that he had left the writ at the residence of the present complainant, and this was all the proof *pro* or *con* on the subject of service, but the complainant showed by Mr. Sibley that he had not been a stockholder in said company, but that the other Robert Campbell was a stockholder:

Held, That it was error in the Judge to charge the jury that the judgment did not conclude the complainant, unless he was personally served with the process.

2. As there was no affirmative evidence on the trial to show which Robert Campbell the plaintiff had intended to sue, and the complainant having been duly served with process in that suit according to law, it was his duty to appear and defend the same, and having failed so to

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do, he is concluded by the judgment, it being the legal presumption that it was made to appear on that trial that the defendant then served was a stockholder, as charged in the declaration, and the jury should in this case have found against the complainant unless it had been made to appear that the verdict in the other suit was obtained by perjury or by taking a verdict without proof (as in case of a judgment by default) of anything but the original judgment.

3. It was not error in the Judge on the trial to permit the statement of the witness Sibley, that "he had no idea that complainant was a stockholder," taken in connection with the witness' other statements; this is only another mode of stating the recollection of the witness that he was not a stockholder.

Service. Judgment. Presumption. Evidence. Before Judge GIBSON. Richmond Superior Court. April Term, 1873.

Hilory B. Frazer recovered a judgment against the Iron Steamboat Company, on June 24th, 1861, after publication of notice under Act of December 10th, 1841, of the commencement of the suit.

When the execution was placed in the sheriff's hands no corporate property could be found. On the 31st of December, 1869, Frazer commenced suit against certain persons as stockholders to enforce the liability imposed on them under the 14th section of the Act of incorporation, approved December 22d, 1835, that "the property of the stockholders shall be bound for all contracts or liabilities made or incurred by said company in proportion to the amount of their stock." A copy writ was served May 5th, 1870, by leaving it at the residence of Robert Campbell, and judgment was rendered against him and others on January 12th, 1872, by default. Execution issued February 3d, 1872. On the 27th of the following May, Campbell filed his bill against Frazer, which set forth the above recited facts, and made substantially the following case:

Complainant never was a stockholder in said Iron Steamboat Company, but he is informed and believes that his nephew, known as Robert Campbell, Jr., residing in the same county with him, was a stockholder therein. He submits that

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the Robert Campbell sued in said action was the stockholder of that name and not complainant. He had no actual notice of the institution and pendency of said action, and if a copy of the declaration was ever left at the residence of complainant, as alleged in the return of the sheriff, the truth of which he can neither admit nor deny, it was not brought to his knowledge. But, that if any such copy declaration was left at his residence, it was so done by the mistake of the sheriff, as the plaintiff in said declaration had not brought suit against him, but against his nephew, the said Robert Campbell, Jr. If said plaintiff did, indeed, intend to sue complainant, it was through a mistake in supposing that he was a stockholder in said company. Complainant submits that the judgment obtained upon either mistake is invalid. The judgment thus obtained is for the principal sum of \$1,044 38, and \$240 00 interest to judgment, with accruing interest and costs.

Prays discovery, that defendant be enjoined from enforcing said judgment, and the writ of subpoena.

The answer is unnecessary to an understanding of the decision and is therefore omitted.

The complainant offered the testimony of Josiah Sibley, that "he was a stockholder in the Iron Steamboat Company from about the time of the incorporation of the company, to the best of his knowledge, recollection and belief, and continued to be such during the existence of the company. He recollects that Robert Campbell, Jr., was at one time a stockholder of said company, and does not know that he ever ceased to be such. To the best of his knowledge, recollection and belief, Robert Campbell, Sr., never was a stockholder in said company. He further states that he now has no idea that Robert Campbell, Sr., ever was such stockholder, and that, for a considerable period, he cannot say how long, he (Sibley) was a director."

To the words, "that he has now no idea that Robert Campbell ever was such stockholder," the defendant objected as inadmissible. The objection was overruled, and defendant excepted.

The complainant closed his case, when defendant, after offering his answer, where responsive to the bill, the exhibits annexed to complainant's bill, and the testimony of the sheriff showing the service at the residence of Campbell, closed.

The jury rendered a verdict for complainant, and a decree was entered enjoining the *fi. fa.* and taxing costs against the defendant.

The defendant moved for a new trial on the following grounds:

1st. Because the verdict of the jury was contrary to the evidence and the principles of justice and equity.

2d. Because the Court refused to charge the jury in the language requested, such request being submitted in writing by defendant's solicitor, "that if Robert Campbell, the complainant, was served with process in the common law suit and failed to plead it, the judgment is conclusive, and he cannot go behind it."

3d. Because the Court refused to charge the jury in the language requested, such request being submitted in writing, "that service of the copy writ at the residence of Robert Campbell is all that the law required, and personal notice is not required to be brought home to him."

4th. Because the Court, when he refused the requests aforesaid, stated, "that if Robert Campbell had been served personally, it was conclusive, but the leaving of the copy writ at his residence was not."

5th. Because the Court refused to charge the jury, at request of defendant's solicitor, such request being presented in writing, "that the public notice of suit, to bind the stockholder, as authorized by the Act of December 10th, 1841, Code, section 3295, was cumulative only, and that stockholders in the Iron Steamboat Company, which was incorporated December 22d, 1835, are not bound thereby." The Court did charge down to the word cumulative, but refused the balance.

6th. Because the Court, in concluding its charge, said, "It was the duty of the jury to ascertain if Campbell had been

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personally served, and if not, then they were to ascertain whether he was a stockholder; that all legal presumptions were in favor of the judicial records of the Court, but that it was the peculiar province of a Court of equity to correct mistakes at law, and if a mistake had been made in serving the wrong person, who had not been personally served with process, the judgment against him should be perpetually enjoined."

7th. Because the Court admitted in evidence, defendant objecting, the statement of the witness, Josiah Sibley, "That he now has no idea that Robert Campbell, Sr., ever was such stockholder."

The motion was overruled and the defendant excepted, upon each of the grounds aforesaid.

The complainant having died after the case was carried to the Supreme Court, his executors were made parties in this tribunal.

F. H. MILLER; R. H. CLARK, for plaintiff in error.

1. The complainant had an adequate remedy at law, and there is no equity in the bill: *Dasher vs. Dasher*, decided July 11th, 1872; Code, sec. 3264; 46 Ga., 396; *Griffeth vs. Mitchell*, decided August 12th, 1873. For he should have waited for a levy to have been made, and then filed his affidavit of illegality as to the service: Code, sec. 3621; 26 Ga., 140. Or traversed the sheriff's return, the first term after notice.

2. To sustain the absence of service, the proof must be strong: 14 Ga., 36. For the sheriff's return will be presumed legal: 19 Ga., 279; 39 *Ibid.*, 22. There was no proof offered by complainant, even by himself, that he had not been served as stated, that he had not received the copy writ, nor of the time when he first received notice of the sheriff's return, and his allegations to that effect in his bill were denied by the defendant and disproved by the sheriff: *Brown vs. Gill*, decided September 23d, 1873.

BARNES & CUMMING, for defendant.

McCAY, Judge.

1. By the express words of the Code, section 3263, (Irwin's,) it is a sufficient service of a writ in an ordinary action, for the sheriff to leave it at the residence of the defendant, and the sheriff's return that he has so done authorizes the plaintiff to proceed just as effectually as if the service had been personal. We cannot, therefore, agree with the Judge in his charge that the defendant was not bound by the judgment, unless it affirmatively appeared that he had got actual notice of the suit. If this be the law, the provision of the Code, authorizing such a service, is not only nugatory, but it will act as a trap upon plaintiffs. We are not prepared to say that if a case should occur of such a service, and it should be made affirmatively to appear that the defendant did not, in fact, get any notice, and a judgment by default was taken against him in a case where he had a good legal defense, a Court of equity would not grant him a new trial; but, in this case there was no such evidence. The complainant, it is true, does say this in his bill, but there was no effort to make any proof of want of notice at the trial. Since our evidence Act of 1866, the failure of the defendant to appear as a witness to make such proof, is an indication that it does not exist. Especially is it true that he has no right to complain, if he is presumed to have got the copy left by the sheriff at his residence, if he fail to appear as a witness to deny it.

2. But it is said that this charge can have done no harm, as the proof shows that the Robert Campbell, now complaining, was not the Robert Campbell sued, and that the judgment is none the better than would a judgment against John Doe be a good judgment against Richard Roe, even if Richard Roe were served. It is said that, even admitting the Robert Campbell filing this bill to have been duly, nay, personally served, yet, as the suit was against another Robert Campbell, the judgment is not binding. But there is no proof that the present complainant was not the very Robert Campbell intended to be sued. He was the person served, and a Robert

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Campbell was, in fact, a stockholder in the company. The plaintiff testifies that he did not know which one was the stockholder, and there is nothing in the evidence to show that it was his intent to sue the other Robert Campbell. There is, in fact, nothing in the evidence to show that the suit was not intended to be against the present complainant, except the evidence of Mr. Sibley that the other Robert was the stockholder. But it seems to us that is a small matter, unless it appeared that the plaintiff knew it. The present complainant was served. It was his duty to appear and defend the suit. Here was a regular suit against Robert Campbell. A Robert Campbell was served with the writ, and he allowed judgment to go against him. It appears to us that it is trifling with the Court for Robert Campbell to come up and say: "This is not a good judgment, because I did not owe any such debt, and, therefore, I am not the person sued." The John Smiths of the country, under such a rule, might always open a judgment, even after personal service. All any one of that numerous family would have to do would be to say: "True, I was served, but I knew I did not owe any such debt as complained against me, and I paid no attention to the suit. It is a fact that I did not owe such a debt, and I insist upon it that the judgment does not bind me." The proof in this case is clear that the complainant was the party served. It is clear to us that the judgment estops him unless he can attack it for fraud. He had a right, even if duly served, to expect, under our law, that the plaintiff would prove his case. We have, in this State, no judgment by default, in the proper sense of those words, except in an action on an open account, when there is personal service, and any man served with a writ has a right to expect the plaintiff will prove his case. The presumption of law is, that it was proven before the jury finding the verdict that the defendant was a stockholder in this company. That is, too, a conclusive presumption, unless it be made affirmatively to appear that, by some *unfair* and *illegal* means, this verdict was obtained without such proof. If the verdict was procured by perjury, that would be a clear case;

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or, if the verdict was taken as a matter of form, as it is often done when the action is on a written agreement to pay money, and the defendant does not, on oath, deny the agreement, that might, if, in fact, the case required proof, be a legal fraud—an imposition—perhaps a thoughtless one, or one based on mistake, upon the jury. But, unless fraud or perjury be shown the presumption is conclusive that proof was made that the cause of action on the writ did, in fact, exist against the Robert Campbell served.

3. We think there was no error in permitting the statements of Mr. Sibley. His language cannot fairly be said to be only the expression of his opinion. It is only a stronger way of stating what he had before said, to-wit: his recollection of the facts, from what he had seen and known of the company and its members.

Judgment reversed.

JAMES B. CONYERS, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

On the trial of a keeper of a billiard table, charged with permitting a minor to play billiards at his table, without the consent of the parent or guardian of the minor, the burden of proving that the parent or guardian did not consent, is upon the State.

Criminal law. Evidence. Before Judge HARVEY. Bar-tow Superior Court. March Term, 1873.

Conyers was placed on trial, charged with the offense of allowing a minor to play billiards on a table controlled by him, without the consent of his parent or guardian. He pleaded not guilty, but the jury found to the contrary. Whereupon he moved for a new trial, because the Court refused to charge the jury, "that the State must show, in addition to the act of playing by the minor, that the defendant did not have the consent of the parent or guardian." The motion was over-ruled and defendant excepted.

50	103
89	645
50	103
4116	849
50	103
4119	123

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WOFFORD & MILNER, for plaintiff in error, submitted the following brief:

We say the Court below committed error in the trial of this cause, by refusing to give the charge as requested by defendant's counsel: Bishop on Criminal Procedure, section 496; Bishop's Statutory Crimes, section 1051; Greenleaf on Evidence, volume 1, sections 78 and 79. We say that this case comes within the exceptions to the general rule that the burden of proof is on the party holding the affirmative; here the negative averment is necessary to make the pleading good, and the *onus probandi* is on the party who makes the averment: Harvey vs. Towns, 4 Eng. Law and Equity R., 531; 6 Exchequer, 656; Code, section 3758; 5 Ga., 86; 7 *Ib.*, 484; 11 *Ib.*, 338; 27 *Ib.*, 593; 11 *Ib.*, 607; 29 *Ib.*, 64; May vs. State, 4 Alabama, 167; State vs. Woodly, 2 Jones (N. C.), 276; State vs. Evans, 5 N. C., 250; 2 Pickering, 103; Chedde vs. State, 4 Ohio State Reports, 477; 2 Pickering, 139; Bowler vs. State, 41 Mississippi, 570; 9 Metcalf, 268; 24 Pickering, 374; Commonwealth vs. James McRie, and the notes; 1st volume Bennett's Cases, 295; 17 Ga., 290.

A. T. HACKETT, Solicitor General, by JACKSON & CLARKE, for the State.

McCAY, Judge.

Whilst it is certainly true, as a general rule, that the burden of proof is upon the party who holds the affirmative of a proposition, yet there are many instances in which a contrary rule obtains. Our Code, 1873, section 3758, declares that "if a negation or negative affirmation is essential to a party's case, the proof of such negative lies upon the party affirming it." The test is, does the negative form an essential ingredient in the thing sought to be established? Does the mind fail to agree to the proposition insisted on, so long as the negation remains unproven? If so, the proposition is not made out and the party asserting the negation must prove it.

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In criminal cases, the law requires that the State shall prove all the essential facts entering into the description of a crime, and, except in a very few special cases, the defendant cannot be put upon his defense, until the State has shown affirmatively every such fact. In *Elkins vs. The State*, 13 Georgia, 435, this Court lays down the rule very broadly and asserts that whatever is made by the statute an essential part of the offense must be set out in the indictment and proven by the State. The want of consent by the parent or guardian is the very gist of this crime. It is not unlawful for men to play billiards. It is not unlawful even for minors to play, if their parents or guardians consent. The want of the consent is the very essence of the offense. There is a class of negations which it is almost impossible to prove affirmatively. Where the field to be covered by the evidence is so broad as that the burden would be intolerable upon the public, to afford the time necessary for hearing the proof, as where it is only possible to prove that one was not present, by examining a large number of persons who did not see him, or where the proof that one did not do a thing can only be established by proof following him from movement to movement, through a considerable time. But there are negations that are just as easily proven as an affirmative, as where the negation depends upon a moment of time and a particular place, or is within the knowledge of a single person. In the former class, even the general rule that the prosecutor in criminal cases must prove all the ingredients of the crime, has, in some cases, been relaxed. As in prosecutions under the English game laws, where one may kill game if he has one of a large number of qualifications, it has been held that it was not necessary for the Crown to go to the expense and the public to suffer the inconvenience of proving the absence of each of the required qualifications, especially (and this is perhaps the true point on which the exception turns) if the facts lie peculiarly in the defendant's knowledge. This was the holding of the Court in *The King vs. Turner*, 5 Maule & Selwyn, 206, and seems to have been followed in 1 Ryan & Moody, 159; 1 Carrington & Payne, 508, and

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by several other English and many American cases, though it is certainly true that the old cases, even on the game laws are different: 2 Lord Raymond, 1415; 1 Strange, 497; 2 Comyns, 525; 1 T. R. 125; 1 East, 643; 1 *Ibid.*, 639, and the Courts have not always kept in mind the distinction between cases when the negative is part of the description of the offense, and when it is by a provision or a subsequent section or by a subsequent Act: 3 Devereaux, 299; 3 B. Mon., 342; 34 Maine, 293; 12 Barbour, 26; New Hampshire, 8. Our own Court has made the exception in the case of an indictment for retailing spirituous liquors without license. In the case of *Sharp vs. The State*, 17 *Georgia Reports*, 290, this Court held that if the selling of spirituous liquors was proven the *onus* was shifted to the defendant, and that it was not necessary for the State to prove the want of license. This is a strong case, for the want of the license is a part of the description of the offense. We are free to say that we do not think the reasoning of the Court in that case very sound, since it is said there that by his plea of "not guilty" the defendant admits the selling, and asserts that he has license—a line of reasoning which is, as it seems to us, untrue, since the plea of not guilty denies the whole charge. But the case may be sustained on another ground, and by authority. The license is a written authority to the dealer to sell, and the presumption is that he has it in his possession. It is peculiarly within his knowledge. The negative *cannot* be shown conclusively by the State. It could only be proven that no such license was recorded; but the defendant might have the license and be not guilty, though the license was not recorded. All the proof in the *power* of the State would be inconclusive, to-wit, that no such license was recorded. The license is in writing, and cannot be proven by parol, and it is in the defendant's possession, if it exists, and on this ground there are many cases making this special crime an exception to the general rule. See the cases, both English and American, above referred to in 1st Bennett's Criminal Cases, and Notes, 306, 319; though there are many cases of high authority to

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the contrary: 24 Pickering, 380, and the cases there cited. But undoubtedly the general rule is, that in criminal cases the burden of showing all the facts necessary to make out the defendant's guilt is upon the State.

In rape, the proof must show that the act was against the will of the female. In robbery, that the taking was against the consent of the person robbed; in larceny from the person, that the taking was without the knowledge of the possessor in the case; of opprobrious words, that they were *unprovoked*, and in the various acts of trespass against property, as cutting wood, etc., on another's land, that they were without the owner's consent. The books are full of illustrations of the position we have asserted, to-wit, that if, in order to make the defendant guilty, it be necessary to show a negative, the burden of showing it is upon the State: *Harvey vs. Towers*, 4 Eng. L. & E. R., 531; *May vs. The State*, 4 Alabama, as when the defendant was indicted for keeping a greyhound, not being a person qualified: 1 *Strange*, 66. In the same volume is a case for profane swearing, under the Act of 6 and 7 Will. 3d. The Act put a penalty of one shilling on a servant, and two shillings on every other person. The conviction was quashed because it was not proven that the defendant was not a servant. So in *Rex vs. Allen*, 1 *Moody*, C. C., 154, and *Rex vs. Rodgers*, 2 *Camp*, 634, in an indictment for killing deer on the ground of another without his consent, it was held that the prosecution must prove the want of consent. See, also, 2 *Greenleaf*, 228; 2 *Car. & Payne*, 45; 2 *Jones*, (N. C.,) 276, where the doctrine is discussed. See, also, 10 *East*, 211, where it was held that the burden was on the Crown to show that the defendant had not taken the sacrament. In 5 *Richardson*, 57, that a practicing physician had no license; that one was not qualified to vote: 9 *Metcalf*, 286.

The case at bar, we think, comes within the general rule. The consent of the parent is not required by the statute to be in writing, and does not, therefore, as in the case of license to sell, lie peculiarly within the knowledge of the defendant. That the consent was not given is as well known to the pa-

Gray vs. Maxwell.

rent or guardian as it is to the defendant. We are, for these reasons, of the opinion that the conviction was wrong, under the proof. There was no evidence of the want of consent, and this was a material ingredient in the offense charged.

Jndgment reversed.

SAMUEL F. GRAY, sheriff, plaintiff in error, vs. JAMES K. MAXWELL, trustee, defendant in error.

1. A sheriff having collected money for a plaintiff in execution is subject to process of garnishment at the instance of a creditor of said plaintiff.
2. Where a balance of money collected on an execution remained in the sheriff's hands, which he was notified was claimed by the attorney for the plaintiff in *fi. fa.* as his fee, and after such notice judgment was rendered against him on a process of garnishment sued out at the instance of a creditor of said plaintiff, he making no defense, which judgment he satisfied, it was not error in the Court, on the hearing of a rule *nisi* requiring him to show cause why he should not pay over such balance to the plaintiff's attorney, to make the rule absolute.

Garnishment. Sheriff. Rule against officer. Execution. Before Judge GREENE. Spalding Superior Court. August Adjourned Term, 1872.

For the facts of this case, see the decision.

JOHN D. STEWART; BOYNTON & DISMUKE, for plaintiff in error.

A. M. SPEER; D. J. BAILEY, for defendant.

WARNER, Chief Justice.

This was a rule against the sheriff to show cause why he should not pay over to the plaintiff's attorney the money in his hands, collected on a *fi. fa.* in favor of the plaintiff. The Court made the rule absolute against the sheriff for the payment of \$100 00, whereupon the sheriff excepted. It ap-

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pears from the record that the sheriff had collected, on an execution placed in his hands, issued from the Superior Court of Spalding county, in favor of the plaintiff, against the defendant therein, the sum of \$250 00; that he paid to the plaintiff, by direction of plaintiff's attorney, \$150 00, but was notified by him, in writing, that he demanded the balance should be paid to him, the attorney, he claiming the right to control the same. The sheriff had been served with a summons of garnishment from a Justices' Court, at the instance of a creditor of the plaintiff in execution. The sheriff answered that he had the money in his hands, but made no objection to the judgment being rendered against him in the Justices' Court for the money collected as sheriff as aforesaid, and paid the same in satisfaction of the Justices' Court judgment, after notice by the plaintiff's attorney, as before stated, which notice was given to the sheriff before the judgment was rendered against him, as garnishee, in the Justices' Court. If the rule was made absolute against the sheriff for the purpose of paying the \$100 00 in his hands to the plaintiff, when he had already appropriated it to the payment of the plaintiff's debt, we should hold it was error, but if it was to be paid to the plaintiff's attorney for his fee in the case, as we infer from the notice given to the sheriff, (though the notice is not very distinct on that point) then the ruling of the Court was right, and, taking that view of it, we affirm the judgment of the Court below.

Judgment affirmed.

MURRAY & COMPANY *et al.*, plaintiffs in error, vs. PAUL JONES, Sr., *et al.*, defendants in error.

50	109
97	663
97	785
50	109
114	653

1. A purchaser of property at an assignee's sale in bankruptcy, under an order of the Register to sell subject to incumbrances generally, is not estopped from denying that a particular incumbrance is a good and valid incumbrance, and he may show that a mortgage on the property

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purchased was made by the bankrupt in fraud of his creditors, and is therefore void.

- 2 A *bona fide* purchaser, without notice of a promissory note and mortgage to secure it, who buys before the debt becomes due, is protected against a defense, that the mortgage was made by the debtor, in anticipation of bankruptcy and to defraud his creditors.

Bankrupt. Incumbrance. Promissory notes. Mortgage. Before Judge HOPKINS. Fulton County. At Chambers. June 2d, 1873.

Murray & Company *et al.*, filed their bill against Paul Jones, and A. M. Perkerson, deputy sheriff of said county, alleging substantially as follows: That the defendant, Jones, was the pretended owner and holder of a promissory note made by Rondeau & Company to J. C. Kyle or bearer, for \$8,000 00, dated February 13th, 1871, payable twelve months after date, and of two mortgages, one made by said Rondeau & Company on the machinery, engine and boiler, etc., in their furniture factory, and the other by Mrs. Amy H. Sells, a member of the firm of Rondeau & Company, on the house and lot on which said factory was located, to secure the payment of the said note to the said Kyle; that Rondeau & Company were adjudicated bankrupts on the 19th of March, 1871, on a creditor's petition filed on the 6th of March, 1871, and that W. R. Hammond, Esq., was duly elected assignee of said bankrupts on the 4th day of April thereafter, and a deed of assignment, conveying all their property, made to him by the Register; that said assignee was placed in possession of the mortgaged property as the property of the bankrupts; that on the 3d of July, 1871, the said mortgaged property was sold at public outcry by the assignee, under an order of Court, passed on the 12th of June, 1871, directing it to be sold, subject to incumbrances, and the complainants became the purchasers at the price of \$2,435 00, and a deed was regularly made to them by the assignee on the 6th of October, 1871; that on the 19th of December, 1871, said Kyle transferred the said note and mortgages to defendant Jones, and when the note fell due Jones foreclosed both the mortgages and had execu-

tions issued and levied upon the property; that the property described in the mortgage executed by Rondeau & Company was advertised to be sold at sheriff's sale on the first Tuesday in June, 1873; that the note and mortgages were never proven in the bankrupt Court; that at the time of the execution of the note and mortgages Rondeau & Company were hopelessly insolvent, their indebtedness being \$35,000, or more, and their assets, not including the property in dispute, which was mortgaged for its full value, less than \$1,000, which was allowed the bankrupts as their exemptions. Rondeau & Company owed complainants over \$4,000 00.

Complainants further charged, on information and belief, that the mortgages were made by Rondeau & Company with intention to delay, defraud, and defeat them and other creditors in the collection of their debts, and that Kyle knew their insolvent condition and fraudulent intention at the time he accepted the mortgages, and did it to enable them to cover up their property and defeat their creditors.

Complainants further charged, on information and belief, that said mortgages were executed within one month prior to the filing of the petition in bankruptcy against said Rondeau & Company, in contemplation of bankruptcy and insolvency, said Rondeau & Company being insolvent at the time, and said Kyle then having reasonable cause to believe them to be insolvent, and to be acting in contemplation of insolvency, and that they made said mortgages with a view to prevent their property from coming to their assignee in bankruptcy, and prevent the same from being distributed under the Bankrupt Act, and to defeat, impair, hinder and impede the provision of said Act, and that therefore they are fraudulent and void. The bill further charged, on belief, that defendant Jones received said note and mortgages with a full knowledge of the facts aforesaid and of the fraud. Prayed an injunction to restrain the impending sheriff's sale, and for a delivery up and cancellation of the mortgages and *fi. fas.* and for sub-pœna, etc.

The bill was supported by two affidavits, as follows:

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W. H. Brooker deposed, that on the 16th day of February, 1871, he saw Rondeau and J. C. Kyle alone together in Rondeau's private office. He walked in where they were and dunned Rondeau for a debt which Rondeau & Company owed him. Rondeau refused to pay it, and put him off. He then asked him to give him their note. He did not want to do this, but upon deponent's threatening to proceed against him in the Courts, he reluctantly gave the note. Rondeau walked out, and deponent asked Kyle if he could see any good reason why Rondeau should refuse to give him a note. Kyle responded that he could not. Deponent then asked Kyle if he was going to let Rondeau & Company have any money. He replied that he had thought about letting them have some, but did not think he would now. Deponent remembered the date because it was the day he was admitted to the Supreme Court.

A. S. Mayson deposed, that in February or March, 1871, he had a conversation with J. C. Kyle. Deponent had bought some goods, and Kyle asked him if he had not bought them of Rondeau & Company. Deponent answered, "Yes." Kyle then said that Rondeau & Company *had* owed him money, but he had got even with them ; that the way he got his money from them was by going to their store from day to day, after breakfast, and staying till dinner, and returning after dinner and staying till supper, until he got his money. He said he believed they were broke, but he had got his money and was satisfied. He remarked that "they were the damndest hardest cases he had ever had anything to do with."

The answer of Paul Jones admitted that he was the owner and holder of the notes and mortgages, as alleged in the bill, and stated that he purchased them for a valuable consideration, and in good faith. Admitted the bankruptcy of Rondeau & Company, as alleged, and that W. R. Hammond was elected or appointed assignee on the 4th of April, 1871. Admitted the assignment to the assignee by the Register, the order of Court allowing the sale, the sale, and the assignee's deed to complainants. Admitted the transfer of the notes and mortgages, as alleged, and the foreclosure and levy. Admit-

ted that the note and mortgages were not proven in the Bankrupt Court, but asserted that it was his privilege to remain out of said Court. Alleged that he did not know what the financial condition of Rondeau & Company was at the time of the execution of the mortgages, but believed they were insolvent. Had acquired his knowledge on that point since their adjudication of bankruptcy; knew nothing of their assets and liabilities. Did not know what Rondeau & Company's intention was in making the mortgages, but believed, from all he has heard, that it was honorable and fair, and without any intention of fraud. Was informed, and believed, that said Kyle had no knowledge of Rondeau & Company's insolvency at the time or before the making of the mortgages. Had no suspicion at the time the papers were transferred to him of any unfairness, and believed then that they were *bona fide* and all right. Would not have bought the papers if he had had any suspicion of a law suit. Admitted that the mortgages were executed within one month before the filing of the petition in bankruptcy, but denied the charge that Kyle had reasonable cause to believe them to be insolvent, etc., and denied any knowledge on his part, of any fraud, etc.

The answer was supported by the affidavit of J. C. Kyle, who deposed that Rondeau & Company and Mrs. A. H. Sells did make and execute the note and mortgages as alleged in the bill to him, on or about the 18th day of February, 1871; that the consideration was \$8,000 00, paid then and there to said Rondeau & Company by deponent. Deponent had previously loaned various sums of money to Rondeau & Company, which had all been repaid; that he was satisfied of Rondeau & Company's solvency at the time, and previously, and had no reason to apprehend that they were not so; that he had no fraudulent intent, and believes that Rondeau & Company had none, but that the whole transaction was in entire good faith; that he did transfer them to Paul Jones, Sr., and told said Jones, at and before the transfer, that the note and mortgages were *bona fide*, and that there was not the least foundation for a suspicion of their validity.

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The cash book of Rondeau & Company was introduced by complainants and showed an entry of \$8,000 00, cash received from J. C. Kyle on the 17th of February, 1871, and that a little over \$4,000 00 of that money was drawn out of the firm assets and charged to the individual account of the members of the firm, and nearly all the balance of the \$8,000 00 was used in defraying their current expenses, and not in paying their preexisting debts, and none was paid to the complainants in this bill.

Complainants also introduced the return of Rondeau & Company in bankruptcy, sworn to by W. A. O. Rondeau, showing that the indebtedness of the firm at the time of the filing of the petition in bankruptcy was \$35,696 82, not including the debt owed to Kyle, and the individual indebtedness of Rondeau, \$7,819 80, and showing their assets, not including the property mortgaged to Kyle, and some open accounts stated to have been almost worthless, to be \$650 00, and also showing that they owed J. C. Kyle \$8,000 00, secured by mortgage.

The Chancellor refused the injunction, and complainants excepted.

D. F. & W. R. HAMMOND; B. H. HILL & SON, for plaintiffs in error.

1. We think the record shows: 1st. Rondeau & Company's insolvency at the time of the execution of the mortgages, and that they did it in contemplation of bankruptcy and insolvency. 2d. That Kyle, the mortgagee, knew they were insolvent at the time, and had reasonable cause to believe that they were acting in contemplation of bankruptcy and insolvency. 3d. That Kyle had reasonable cause to believe that Rondeau & Company executed these mortgages in order to prevent their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the Act, etc. "Reasonable cause means a state of facts or circumstances which would lead any prudent man to make inquiries:" Bump on B., 405, 456; in re Wright, 2 B. R., 155; in re Arnold, 2 B. R., 61; White vs. Raftery, 3 B. R., 53; 1 B. R., 146.

2. Complainants have the right as purchasers at assignee's sale to have the mortgages delivered up and canceled if they are void. They have purchased the interests and rights of the creditors of Rondeau & Company: *Williams vs. Vermeule*, 4 Sand. Ch., 388; *Seaman vs. Stoughton*, 3 Barb Ch., 348; *Dodge vs. Shelton*, 6 Hill, 9; *Dwinel vs. Perley*, 32 Maine, 197.

3. The mortgages are void as to creditors: Code, 1942; *Fl. vs. T.*, 6 Ga., 110.

4. If they were void, the transfer to Jones could not vitalize them. The assignee of a mortgage takes it subject to all the equities it was subject to in the hands of the mortgagee: 2 Story's Eq. Jur., 1018 (*d*); *Guerrey vs. Perryman*, 6 Ga., 123; 12 Mass., 197; 13 Mass., 205; 3 Story's Reports, 365.

E. F. HOGE; R. S. JEFFRIES, for defendants.

(I.)

1. It was not necessary to prove the note and mortgage in the Bankrupt Court. The State Court has concurrent jurisdiction with the United States Court in this case. The rights of the State Court are not extinguished, inasmuch as the jurisdiction of the United States Court is not exclusive: *Jones vs. Lellyett*, 39 Ga., 64; *Bump on Bankruptcy*, Ed. 1873, p. 198; *Woolfork vs. Murray*, 44 Ga., 123; *Clark vs. Benninger*, 3 B. R., 129; *Clifton vs. Foster*, 3 B. R., 162; in re *Hugh Campbell*, *American Law Times*, volume 1, *Bankrupt R.*, p. 30.

2. The assignee may sell the property of the bankrupt, subject to the lien of a secured creditor. In that case the secured creditor may prove his claim or not, as he chooses: *Bump on Bankruptcy*, Ed. 1873, p. 85; *Gazzam on Bankruptcy*, foot note, page 212; in re *Sampson et al.*, 4 B. R., 1.

3. The Bankrupt Act does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such a loan, provided it be made *bona fide*, and without intent to defraud

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creditors or defeat Bankrupt Act. This loan was *bona fide*. This mortgagee was not a creditor, nor did he have any claim against Rondeau & Company, nor was he under any liability for Rondeau & Company. It was not contrary to section 35, Bankrupt Act: *Darby's Trustees vs. Boatman's Savings Bank*, American Law Times, volume 4, Bankrupt R., page 117.

4. There is nothing in the Bankrupt Act which forbids security being taken by mortgage, when there is a present passing interest equivalent to the thing secured. Evidence produced in exhibit by plaintiff in error shows that \$8,000 00 did pass from Kyle. The evidence shows no intention of fraud on part of mortgagee: *Gazzam on Bankruptcy*, pp. 81, 98; Section 14 United States Bankrupt Act.

(II.)

1. Question is at issue between a *bona fide* purchaser of a note and mortgage before maturity, without notice, and purchasers at an assignee's sale, with notice, of the incumbrance. This property was fully administered by judicial process from Bankrupt Court. The assignee petitioned to sell, free from incumbrances, but the petition was not granted. The property was ordered to be sold subject to incumbrances, and was so sold, with notice to the world of the incumbrances. The object of selling was to get all over the amount of the incumbrance. The purchaser bought, at the assignee's sale, simply the bankrupt's and general creditors' interest, leaving the lien of secured creditors undisturbed. They are now seeking for an interest never purchased. Seeking to defeat a right which they have acknowledged, Supreme Court must presume that the judgment of Bankrupt Court commanding assignee to sell subject to liens was correct. The assignee has done all that the bankrupt law requires. He has secured the secured creditors by acknowledging their liens, and he has sold surplus to satisfy general creditors. Hence, there has been a complete administration of the bankrupt law. The purchasers are estopped from denying the validity of the liens,

because it was a judgment of the United States Court, that it was subject to incumbrances, and purchasers bought, acknowledging the incumbrances: Rump on Bankruptcy, edition 1873, p. 150.

2. Paul Jones is a *bona fide* transferee before maturity, and without notice, and is, for that reason, protected: Irwin's Revised Code, section 2743; Beall vs. Harrold, N. B. Register, volume 7, page 400.

3d. The procurement by fraud must be brought home to the transferee in order to render the note and mortgage void. There is no evidence going to show that Paul Jones participated in the fraud. Fraud in the procurement, as specified in the Georgia Code, means fraud in the procurement by holder thereof: Roberson vs. Vason, 37 Ga., 66.

4th. The debt or note of the debtor is the principal, the mortgage is the collateral, or incident. Transferee having the note, necessarily carries the mortgage and rights thereto: Roberts vs. Mansfield, 32 Ga., 228; Welborn vs. Williams, 9 *Ibid.*, 86; Jervis vs. Smith, Nat. B. R., vol. 3, p. 147; Bump on Bankruptcy, edition 1873, page 433.

5th. There is no evidence in this bill showing that Paul Jones is not a *bona fide* transferee, except the affidavit of Hammond, (the plaintiff's attorney,) founded on the information of others. His evidence is insufficient. The allegation must be direct and positive before an injunction can be granted: Jones vs. M. & B. R. R. 39 Ga., 138; Irwin's Revised Code, 3037.

McCAY, Judge.

1. We are not prepared to say that the purchaser at the assignee's sale cannot set up that the mortgage is fraudulent. True, there are cases that way: 34 New Hampshire, 102; 98 Massachusetts, 305; 32 Maine, 197. But there are cases *contra*: Williams vs. Varnneli, 4 Sand's (N. Y.) Chancery, 388; Seaman vs. Slaughton, 3 Barbour Chan. R., 348; Dodge vs. Shelton, 6 Hill, 9.

On principle, it would seem that the right of the purchaser

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turns on whether the assignee has *affirmed* the sale or mortgage. Without question, if he has done this, the purchaser would be estopped. The assignee may unquestionably affirm the fraud. That is, he may say "true the deed or mortgage is a fraud on the law, but if the vendee will pay the money to me I will let the *sale stand*." And the real question, in principle, would be, has the assignee done this in fact? Or has he done it in effect by so acting as to induce the purchaser at *his sale* to suppose that he has affirmed the sale or mortgage, by the bankrupt? We do not think this is done by the simple sale, under an order to sell subject to *incumbrances* generally. The deed, in 98 Massachusetts, definitely mentioned the specific mortgages, and the land was sold subject to them. Here is no specification. The order is to sell subject to incumbrances. What incumbrances? Any that anybody may have, legal or illegal, void or not void, fraudulent or not fraudulent? This seems to us absurd. The order of the register to sell subject to incumbrances must be taken to mean subject to legal incumbrances. It is not at all in the nature of a judgment that any particular incumbrance is a valid one, and, in our judgment, it is giving it a very improper scope to say so. The purchaser buys the title of the assignee. He is the agent of both the bankrupt and the creditors, and we think the purchaser buys all their *rights*. If they have intentionally and for a consideration, affirmed the mortgage, as a matter of course, they, having no further rights, the purchaser would get no rights to attack it. But it seems to us that a mere failure, perhaps because they did not know of the fraud, to attack it, is no affirmance.

2. But, we think the facts in this record show that Jones is an innocent purchaser. There is no *proof* that he is not, and his answer is positive. As to the fact, therefore, we think the Judge was bound so to think; nor is there *constructive notice*. Jones was no party to the proceedings in bankruptcy, nor was this mortgage in question there. The creditors might have attacked it, or Kyle might have proven his debt. It appears that he did not. At any rate, this land was sold be-

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fore Jones purchased. Even the right to attack it in *bankruptcy* had passed away and been dismissed before Jones purchased. There was, at *the time*, no *lis pendens* involving the validity of the mortgage. That question had been turned over to the purchaser, so that Jones bought without notice, express or constructive. But it is said this mortgage, if in violation of the bankrupt law, is void for fraud. All fraudulent deeds and acts are void. But nothing is better settled than that this kind of fraud cannot be set up against an innocent purchaser, one who does not know of the fraud: Irwin's Revised Code, 1942; 8 *Georgia*, 274, 7 *Ibid.*, 534; Bond vs. Harrold, N. B. Register, vol. 7, page 100; Irwin's Revised Code, 2743; 37 *Georgia*, 66. Nor is it true that the assignee of a mortgage is always open to the equities between the parties. This is true of all choses in action, except negotiable securities: Revised Code, section 2218. But under our law, "all bonds, specialties, or other contract in writing for the payment of money, or any article of property, are negotiable by indorsement or written assignment:" Revised Code, section 2734. True, a mortgage is not exactly "for the payment of money;" but it is not a title. In this State it is only a "*security for a debt*." It is generally to the mortgagee and his *assigns*, and as this Court has held, more than once, the transfer of the note, with nothing more, passes the mortgage: 32 *Georgia*, 228, 9 *Ibid.*, 86. But in this case there was a special assignment. We think, for these reasons, the Court was right in refusing the injunction.

Judgment affirmed.

THOMAS J. JOHNSON, plaintiff in error, vs. JAMES S. SIMS,
defendant in error.

1. On the trial of an action brought upon a promissory note, the Court charged the jury that the note, upon its face, was a promise unconditional to pay the principal and interest appearing to be due thereon, and that parol evidence to show that the interest was not to be paid at

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all events, but was to depend on the profits of an uncertain partnership speculation, should be of a satisfactory character, or strong enough to overturn, in the minds of the jury, the *prima facie* evidence of the original contract as furnished by the writing :

Held, That this was not an expression of opinion by the Court as to facts which had been proven, so as to be error, under section 3183 of Irwin's Revised Code.

2. There was direct evidence as to the specific amount found by the verdict, and the testimony furnishes data from which a fair and reasonable calculation can be made to sustain it.

New trial. Charge of Court. Before Judge HARVEY.
Floyd Superior Court. July Adjourned Term, 1872.

Sims brought complaint against Johnson on a due bill, dated October 11th, 1865, signed by L. B. Reed and defendant, payable to James S. Sims, or bearer, for \$390 23 in gold. The declaration stated that Reed was a non-resident of the State. No process was prayed as against him. The defendant pleaded the general issue and payment.

The defense sought to be established by the evidence was that Sims, Reed and Johnson formed a copartnership for the purchase and sale of cotton. Sims was to advance all the money, to have one-half the profits, or to bear one-half the losses. Reed and Johnson were to give their notes for one-half the amount advanced. The due bill sued on was given in this way. That losses accrued on the transactions had; that a final settlement had been made between the parties on February 26th, 1868, in which the balance due Sims had been paid him.

The evidence was very conflicting. Sims contended that a partnership was not intended, though, by operation of law, one may have been actually formed. He simply made an advance of money in gold, as a loan, to Reed and Johnson, they agreeing to allow him one-half the profits of their operations in the purchase and sale of cotton, and he agreeing to share one-half the losses. No final settlement was ever made, but upon such settlement there would be found to be due the amount of the aforesaid due bill.

Reed testified that Sims was to furnish all the money free of interest.

The voluminous testimony is omitted, as it embraces nothing that will tend to illustrate any principle of law enunciated in the decision.

The Court charged the jury as follows: "The note sued upon, on its face, is a promise unconditional to pay the principal and legal interest appearing to be due thereon, and if parol or verbal testimony is relied on to overturn the *prima facie* evidence of the original contract furnished by the writing, to show, for instance, that the interest was not intended to be paid at all events, but was to depend on the profits of an uncertain partnership speculation: I say, for us to substitute parol evidence for the writing in such a case, the parol evidence should be of a satisfactory character, or strong enough to overturn, in the minds of the jury, the *prima facie* evidence of the original contract as furnished by the writing. But if the admissions or acts of both parties, or other evidence to your minds sufficient, satisfy you that such was the real contract, intention and understanding of the parties, you may so find."

The jury found a verdict for the plaintiff for \$297 00, with interest from February 26th, 1868, the date of the last settlement set up in the plea. The defendant moved for a new trial, because of error in the charge aforesaid, and because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

C. ROWELL, for plaintiff in error.

DUNLAP SCOTT; W. G. JOHNSON, for defendant.

TRIPPE, Judge.

1. The charge of the Court to the jury, as given in the fifth ground of the motion for a new trial, does not violate the rule prescribed in section 3183 of Irwin's Revised Code. It only recites a clear legal principle. The note sued on was

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an unconditional promise to pay the principal and interest mentioned ; and this could not be, and was not denied, either as a fact, or a correct statement of a legal truth. The Court did not assume before the jury what was or was not proven. The charge only gives what, in law, the note was, that is, construed a written instrument, which was in evidence, and which it was the duty of the Court to do, if, indeed, there was any necessity for a construction of this one. The charge, so far as it pertains to what parol evidence should be, to show that the interest was only to be contingently paid, when all is taken together, could have done no damage to the defendant ; nor did it do violence to any legal rule. It was, in substance, that it should be of a satisfactory character, or strong enough to overcome the *prima facie* evidence furnished by the written contract. The defendant surely could not object to the note being styled *prima facie* evidence. It was, in truth, something more than that. The Court also immediately added : " But if the admissions or acts of both parties, or other evidence to your minds sufficient, satisfy you that such was the real contract, intention and understanding of the parties, you may so find." This was certainly giving sufficient latitude to the jury.

2. There is direct and positive evidence to the specific amount found by the verdict, and also sufficient data proven from which a calculation can be easily made to sustain it ; and of all this the jury were to determine.

Judgment affirmed.

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J. P. GRAVES, plaintiff in error, vs. N. & A. F. TIFT, defendants in error.

1. The County Court Act of January 19th, 1872, is a general law of the State, except as therein specially excepted ; and the Act of August 24th, 1872, establishing a County Court in the counties of Dougherty and Lee, only repeals the Act of 19th January, 1872, so far as it is inconsistent therewith.

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2. Under the general law of January 19th, 1872, the Judge of the County Court has authority to issue distress warrants and there is nothing in the Act organizing a County Court for Dougherty county, inconsistent with such an authority in the County Judge of that county, so that he also has authority to issue distress warrants.
3. Where a levy under an illegal distress warrant is dismissed, the Court has no authority to retain the case until a new warrant can be issued. (R.)
4. Where a bill of exceptions is filed to proceedings had upon the trial of a claim case, the defendants in *fi. fa.* are not necessary parties: See end of report (R.)

County Court. Distress warrant. Construction of statutes. Before Judge STROZER. Dougherty Superior Court. April Term, 1873.

Graves sued out a distress warrant against F. R. Roberts and W. S. Davis for \$500 10, and had the same levied on five bales of cotton as the property of the defendants. The affidavit was made before Honorable David H. Pope, the Judge of the County Court of Dougherty county, and the warrant was issued by the same officer. The property levied on was claimed by N. & A. F. Tift. Upon the trial of the issue thus formed, the claimants moved to dismiss the warrant and the levy on account of the want of authority in the County Judge to issue such process. The motion was sustained, and the plaintiff excepted.

When this case was called, a motion was made by counsel for defendants to dismiss the writ of error, upon the ground that the defendants in execution were not made parties to the bill of exceptions. The motion was overruled and the principle embraced in the fourth head-note enunciated.

T. R. LYON; WARREN & ELY, for plaintiff in error.

HINES & HOBBS, for defendants.

McCAY, Judge.

This case is controlled by the decision we made in *Patillo vs. State* last week. The Act of 19th January, 1872, expressly authorizes the Judge of the County Court to issue

distress warrants, and there is nothing in the County Court Act for Dougherty, passed in August, 1872, inconsistent with the general law on this subject. The Act of January 19th, 1872, is a general law for the State, except as to the counties excepted. Dougherty is not one of them. The failure or refusal of the grand jury to authorize the appointment of a Judge does not affect the operation of the law in that county, whenever a Judge is otherwise legally appointed. The general law, when not inconsistent with the Act of August, 1872, regulates the powers and duties of the County Judge of Dougherty, as well as the Judges of other County Courts. Nor is there anything in the argument that County Courts are abolished by the Constitution of 1868. The County Courts "then existing," were abolished; but by section 1st of Article 5th, of the same Constitution, the Legislature is authorized to establish other Courts.

We do not think the request to the Judge to retain the case until a new distress warrant would issue, was at all proper. If the warrant was illegal, the levy was void. A new levy would have to be made. The property was not in the hands of the Court. There is no analogy between this case and a case where the money was in Court for distribution.

Judgment reversed.

GEORGE P. BURNETT *et al.*, plaintiffs in error, vs. ADOLPHUS E. ROSS, administrator, defendant in error.

Where the verdict of the jury does substantial justice between the parties, and no error of law has been committed, the discretion of the Supreme Court refusing a new trial will not be interfered with.

New trial. Before Judge HARVEY. Floyd Superior Court. July Term, 1872.

For the facts of this case, see the decision.

SMITH & BRANHAM, for plaintiffs in error.

PRINTUP & FOUCHE, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants on a promissory note, for the sum of \$25,161 00, dated 4th February, 1863, payable in current funds, two years after date, with interest from date. There were two credits on the note, amounting to \$16,300 00. On the trial the jury found a verdict for the plaintiff, for the sum of \$1,672 00. A motion was made for a new trial, which was overruled, and the defendants excepted

This was a Confederate contract, and the main question in controversy between the parties at the trial, was whether a payment made by the defendants about the 1st of April, 1865, to the plaintiff, of \$3,700 00 in Confederate money, but not credited on the note, was received by the plaintiff at its nominal value, or whether it was received to be credited on the note at its gold value. The original plaintiff was dead at the trial, and his administrator was made a party. The note was given for land proved to be worth \$15,000 00 or \$16,000 00 in good money; one witness proved that the land was worth more. There was evidence before the jury, admitted without objection, going to show that the plaintiff received the Confederate money to be credited on the note only for what it was worth. There is sufficient evidence in the record to authorize the charge of the Court to the jury in relation to that point in the case. In looking through the record, we are of the opinion that the verdict of the jury did substantial justice between the parties, at least the defendants have no right to complain of it. There was no error in overruling the motion, for a new trial.

Let the judgment of the Court below be affirmed.

McCoy vs. Wily.

SOLOMON MCCOY, plaintiff in error, vs. JOHN H. WILY, defendant in error.

The evidence for the plaintiff in this case is deficient, in that it fails to show that the mule was afflicted with the disease of which it died at the time of the warranty, and it was no abuse of the discretion of the Judge to refuse to grant a new trial.

New trial. Warranty. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

McCoy brought assumpsit against Wily for \$500 00, his declaration making the following case :

On August 15th, 1870, the plaintiff exchanged a horse, of the value of \$125 00, with the defendant for a mule, which, if sound, would have been of the same value. The defendant warranted said mule as sound. But the mule, at the time of said exchange, was suffering with the disease known as the glanders, of which she subsequently died. She was entirely useless to the plaintiff, and caused him an expense of \$50 00. In addition, the plaintiff has been damaged by said disease having been communicated to a horse belonging to him, which has also thereby been rendered valueless.

The defendant pleaded not guilty.

The evidence was substantially as follows : On Saturday evening, about the time specified in the declaration, the exchange was made. The defendant repeated several times that "the mule was sound as a dollar," and that the plaintiff "need not doubt it." On the Monday morning after the trade, the plaintiff hitched the mule to a wagon and drove her about fifty yards, when she gave out. She was never afterwards able to work. On the 10th and 20th of September, 1870, plaintiff exhibited said animal to two of his neighbors, Jacob C. New and Levi Chenning, who were acquainted with the diseases and value of horses. New and Chenning testified that the mule had the glanders, and was worthless. She died five or six weeks after the trade. At the time of the exchange the defendant told the plaintiff that he had lost a mule a few days before, but did not know of what disease he died.

McCoy vs. Wily.

Evidence was introduced as to the value of the horse unnecessary here to be set forth.

The jury returned a verdict for the defendant. Plaintiff moved for a new trial because the verdict was contrary to the law and the evidence. The motion was overruled, and the plaintiff excepted.

HILL & CANDLER, for plaintiff in error.

PEEPLS & HOWELL, for defendant.

McCAY, Judge.

We cannot say that the verdict in this case is so contrary to the evidence as to justify this Court in overruling the judgment of the Judge of the Superior Court refusing a new trial. We incline to think the plaintiff had a better case than his evidence presents. But as it stands, his proof is not such as to *require* a verdict. The mule could hardly be so completely worthless on Monday, without the witness noticing some defect on Saturday, unless something intervened on Sunday. The two witnesses who testified to the mule having the glanders, do not, as they tell it, fix a time that makes it necessary the mule should have been diseased at the trade. There is, therefore, some defect in the evidence. It does not show anything but a *probability* that the mule was diseased at the time of the warranty. Nor is that probability so strong as to force the conviction of its truth. There is fair room to suspect that the plaintiff is trying to put upon the defendant a misfortune which may, in fact, have been wholly his own. This the jury seem to have thought, and whilst it is possible for a fair-minded man to think otherwise from the testimony, yet, in our opinion, the proof is open to this view. We cannot, therefore, under the established rule, undertake to reverse the judgment of the Court refusing a new trial.

Judgment affirmed.

JOHN C. WELCH, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

Where, upon a trial had upon an indictment for the offense of murder, the jury return a verdict finding "the prisoner guilty of manslaughter," the legal effect of the verdict was to find the defendant guilty of the highest grade of manslaughter, to-wit: voluntary manslaughter.

Criminal law. Verdict. Before Judge KNIGHT. Cobb Superior Court. January Special Term, 1873.

For the facts of this case, see the decision.

GEORGE N. LESTER; JOHN O. GARTRELL, for plaintiff in error.

C. J. WELLBORN, Solicitor General, by Z. D. HARRISON for the State.

WARNER, Chief Justice.

The defendant was indicted for the offense of murder. On the first trial of the accusation, the jury found the defendant guilty. The Court below granted a new trial, and on the second trial, the jury found the following verdict: "We, the jury, find the prisoner guilty of manslaughter." A motion was made in arrest of judgment, on the ground that the verdict of the jury was too indefinite, uncertain and illegal, and is so contrary to law that no legal judgment or sentence can be pronounced or executed upon the same; which motion was overruled, and the defendant excepted.

There are two grades of manslaughter, as defined by our Code: Voluntary manslaughter, upon a sudden heat of passion; involuntary manslaughter, in the commission of an unlawful act, or a lawful act, without due caution and circumspection. The punishment of voluntary manslaughter, and the punishment of involuntary manslaughter in the commission of an unlawful act, and the punishment of involuntary manslaughter in the commission or performance of a lawful act, where there has not been observed necessary discretion

Welch vs. The State of Georgia.

and caution, is different in each of the grades enumerated. In the case of voluntary manslaughter there is an intention to kill. In cases of involuntary manslaughter the intention to kill is wanting. What is the legal effect of the verdict of manslaughter in this case? In our judgment, the legal effect of the verdict was to find the defendant guilty of the highest grade of manslaughter, to-wit: voluntary manslaughter. Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity: Code, sec. 3503.

The defendant was charged with the offense of murder. The jury found him guilty of the second grade of homicide, but did not intend to find that the killing was involuntary, and without intention to kill, or they would have said so by their verdict; but, on the contrary, they found him guilty of manslaughter—that is to say, they found that the act of killing was voluntary by not finding the defendant guilty of involuntary manslaughter, and thereby negative the idea that the killing *was voluntary*. If the jury had found the defendant guilty of involuntary manslaughter, then their verdict should have specified whether it was in the commission of an unlawful act, or in the commission of a lawful act, without the necessary discretion and caution, because one is made a felony, and punished as such, but the other is not: Code, secs. 4262, 4263.

The punishment of manslaughter, other than involuntary manslaughter, is definitely prescribed by the Code, and when the jury found the defendant guilty of manslaughter without saying it was *involuntary*, the legal effect and intendment of the verdict was to find him guilty of voluntary manslaughter; otherwise, the verdict could not receive a reasonable construction and intendment. There are but two general grades of manslaughter recognized by the Code: voluntary, and involuntary manslaughter, and as the jury did not find the defendant guilty of involuntary manslaughter, the legal presumption is, that they intended to find him guilty of the highest grade of that offense, and the Court below did not err in pronounc-

ing its judgment therefor: *Bullock vs. The State*, 10 *Georgia Reports*, 60; *Dean vs. The State*, 43 *Ibid.*, 218; *Long vs. The State*, 12 *Ibid.*, 293.

Let the judgment of the Court below be affirmed.

50	130
108	688

50	130
118	745

MARTIN L. RUFF *et al.* plaintiffs in error, vs. M. M. PHILLIPS *et al.* defendants in error.

1. A private nuisance may be abated in this State, under the provisions of section 4023, etc., of the Revised Code, provided the application is made by the party injured.
2. The petition for a *certiorari* is an *ex parte* proceeding, and if the petition shows a proper case for the writ it ought to be granted. It is error in the Judge to hear contradictory or supplementary statements from the defendant.
3. To make a business a nuisance it must be such to people of ordinary nature or condition; it is not sufficient if it be simply offensive to delicate and sensitive organizations.
4. An order abating a nuisance ought not to exceed the necessity of the case, and if it do this it should be set aside.

Nuisance. *Certiorari*. Before Judge KNIGHT. Cobb county. At Chambers. February 14th, 1873.

Martin L. Ruff, John R. Winters and Milledge G. Whitlock, presented their petition for *certiorari* to the Honorable N. B. Knight, Judge of the Blue Ridge Circuit, making the following case:

On February 7th, 1873, there came on to be heard before the President and Commissioners of the town of Acworth a certain cause in which M. M. Phillips, Thomas D. Perker-son and John Q. Tanner were plaintiffs, and petitioners, defendants, in which the former charged that a warehouse in the town of Acworth, used by petitioners as a place of storage for commercial fertilizers, was a nuisance to them. Petitioners moved to dismiss said case upon the following grounds, to-wit:

Ruff et al. vs. Phillips et al.

1st. Because the nuisance complained of, if any, was a private and not a public nuisance.

2d. Because there is no ordinance of the town of Acworth making said depot a nuisance, or declaring how the same may be abated or removed.

The motion was overruled and petitioners excepted upon each of the grounds aforesaid.

The evidence showed that said warehouse was near the right of way of the Western and Atlantic Railroad Company, and about one hundred and fifty yards east of the depot in the town of Acworth; that on one side of said warehouse there was a double railroad track and a wide street, and on the other side a wide street, separating it from any other house; that one Joel Chapman resided nearer to said warehouse than any other person; that his wife, on one occasion, since fertilizers had been stored in said warehouse, was troubled with nausea, and had lost one meal therefrom; that no physician was called in; that his wife had suffered from nausea before said fertilizers had been thus stored, but that, in his opinion, in this instance, the nausea was caused by the odor arising from the fertilizers; that John Q. Tanner and his wife and child were nauseated by the odor from said fertilizers; that he had been thus affected before said fertilizers were stowed in said warehouse; that no physician was called in; that petitioners proved that neither before nor during the trial was there stored in said warehouse anything but five car loads of what is known as "John Merriman's Ammoniated Bone Dust;" that there was nothing in said fertilizer calculated to produce disease, but, on the contrary, the ammonia contained therein rendered the odor arising therefrom healthy.

The President and Commissioners aforesaid adjudged said warehouse and its contents to be a nuisance, and ordered that the same be abated within ten days, or that a fine of ten dollars would be assessed against petitioners, and said warehouse and its contents would be moved at their expense.

Pending the consideration of the application for the writ

Ruff *et al.* vs. Phillips *et al.*

of *certiorari* the Judge was furnished by the plaintiffs in the original case with a copy of the evidence adduced before the President and Commissioners of the town of Acworth.

On February 14th, 1873, the Judge refused to sanction the petition as follows: "After a careful examination of the petition and evidence in this case, the writ of *certiorari* is refused."

To which judgment petitioners excepted on the following grounds, to-wit:

1st. Because the Judge erred in refusing to sanction the petition.

2d. Because the Judge erred in considering the evidence alleged to have been adduced before the President and Commissioners of the town of Acworth.

GARTRELL & DUNWOODY; LESTER & THOMSON, for plaintiffs in error.

C. D. PHILLIPS, by brief, for defendants.

McCAY, Judge.

1. Section 4027 of the Revised Code, provides that "A public nuisance may be abated on the application of any citizen of the district, and a private nuisance on the application of the party injured." Coming, as this does, immediately, next after the sections pointing out the mode of abating public nuisances, it is impossible to say that a private nuisance cannot be *abated*. Abated is a technical term. Neither an action for damages nor an injunction can *abate* a nuisance. An injunction may prevent, and a verdict for damages may punish, but neither of them will abate a nuisance. We are clear, therefore, that under the Code, a private nuisance may be abated by the same tribunal, and under the same provisions as are provided in sections 4023, 4024, etc., of the Code.

2. We think the Judge was bound to judge of the sufficiency of the petition from the facts stated in it. The pro-

tection given by law to the other side is the affidavit and bond of the petitioner. If the petition, properly verified, makes such a case as requires the writ, it ought to issue. The only mode of contradicting the petition provided by law, is the *official return* of the inferior tribunal, made as the law requires. It was, therefore, error in the Judge to hear and consider what came to his office out of the hands of the other party, and not as an official return to the *certiorari*. The plaintiff in *certiorari* has, under section 3994 of the Code, a right to traverse even the return, and it is entirely irregular to permit his statement in the petition to be controverted or supplemented by his opponent on his application for the writ.

3. We think this petition makes out a *prima facie* case. The proceeding the defendant is called upon to answer ought to notify him what is complained of. A nuisance is a very broad term. The proceeding to abate is a very harsh remedy, and everything should appear on the face of the proceedings to justify it. Fair notice of the nature of the complaint ought to be given. The defendant may, perhaps, if it be pointed out *in what manner* he is hurting the complainants, take efficient means to stop the evil. We do not think the ordinary use of a guano depot is a very serious matter. Every day's experience shows that every variety of these manures are carried upon railroads, stored in houses, sold in market, handled by employees, hauled through the streets and put out upon land without serious annoyance to anybody. We suspect the stomach which sickens at the smell of an article now in such common use, which, in its worst form—Peruvian guano—is carried by the ship-load thousands of miles, is not a stomach of an ordinary kind. It is too nice, perhaps, from some disease, for ordinary life. It is not against exceptional organizations that the nuisance arises. To make a thing a nuisance it ought to be of such a character as would hurt or annoy in the legal sense of those words—ordinary people—not nice, susceptible, sickly people.

4. We think, too, that the judgment of the Court directing the removal of the house and affixing a fine was beyond

Wallace vs. Sanders.

the necessity of the case. Why should the house be removed? Cannot the nuisance be removed by removing the storage? Nor had the Court, in the capacity in which it sat, power to fine. We think this *certiorari* ought to have been granted.

Judgment reversed.

CAMPBELL WALLACE, superintendent, plaintiff in error, vs.
WILLIAM C. SANDERS, defendant in error.

1. When a carrier sets up the defense that the loss of property delivered to him for transportation, was occasioned by the public enemies of the State, he must establish that fact by clear and satisfactory evidence.
2. When property, received for shipment by a carrier and placed upon one of his cars, was removed therefrom by the public enemies of the State, it was incumbent upon the carrier to care for the property after it was taken from the car, and if he failed to do so in such reasonable manner as was necessary and practicable under all the circumstances, and it was lost, he will be held liable.

Carriers. Public enemies. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

For the facts of this case, see the decision.

P. L. MYNATT, for plaintiff in error.

WILLIAM EZZARD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the value of one horse, two mules and one wagon, received by the defendant on its cars, to be carried from Dalton to Atlanta, which were lost. On the trial, the jury found a verdict for the plaintiff. A motion was made for a new trial, which was overruled, and the defendant excepted. This is the second time this case has been before this Court: See 42d *Georgia Reports*, 486. The defense set up by the defendant was, that after the plaintiff's property was

put on its cars the Confederate military authorities took possession thereof, and loaded the same with military stores and equipments. What was done with the plaintiff's property does not affirmatively appear, but the presumption is that the military authorities displaced it, as the wagon was found at or near the place where it was put on the defendant's cars. The Court charged the jury, "that when the carrier sets up the defense that the loss of the property was occasioned by the public enemies of the State, the burden of proof is upon him to prove, by clear and satisfactory evidence, that fact. If the property was lost, and the loss was occasioned by the military forces of the Confederate States, or by the authority of the Confederate States, and there was no negligence on defendant's part that contributed to the loss, it would not be liable. If you should find that the property was received for shipment by defendant, and placed in one of its cars, and was taken from the cars by the military or by the authority of the Confederate States, it was the duty of the defendant to care for the property after it was taken from the cars, and if it failed to do so in such reasonable manner as was necessary and practicable under all the circumstances, and it was lost, the defendant would be liable." We find no error in the charge of the Court, in view of the facts contained in the record, and as the verdict is right, under the evidence, we affirm the judgment of the Court below.

Judgment affirmed.

JOHN D. FIELD, JR., administrator, plaintiff in error, vs.
WILLIAM P. PRICE, defendant in error.

1. Whilst, as a general rule, the principal alone can sue on a contract made by an agent, for the benefit of the principal, yet, if the agent himself have an interest in the contract, he may sue upon it in his own name.
2. In this case the contract clearly includes the Sisson *fi. fa.*, as one of the debts agreed to be paid out of the proceeds of the land.

Field vs. Price.

8. Where there have been two judgments of the Court, on illegalities to an execution, both ordering the same to proceed as a valid execution, it is too late for the defendant to set up a new defense to the execution which existed before the judgments and of which he was fully informed at the time of the judgments.

Principal and agent. Illegality. Judgment. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1873.

Field, as administrator of D. H. Mason, deceased, brought complaint against Price upon the following note:

“GEORGIA—LUMPKIN COUNTY.

“Twelve months after date, I promise to pay to John D. Field, Jr., administrator of D. H. Mason, deceased, or bearer, \$300 00, with interest from date, for value received, it being purchase money for two lots in the town of Dahlonega, Georgia, lying opposite to and east of the residence of Colonel William Martin, deceased, late of said county, containing one acres more or less, this note to operate as a mortgage lien upon said lots until the money is paid, subject to foreclosure.

“Witness my hand and seal, this 1st, day of January, 1868.

“Attest: (Signed) W. P. PRICE. [L.s.]

“N. F. HOWARD.

“W. A. BURNSIDE, Ordinary.”

The defendant pleaded as follows: That a written contract was entered into between the plaintiff and this defendant, as attorney for the plaintiff, in certain executions against the Dahlonega Tanning and Leather Manufacturing Company, of which plaintiff's intestate was a stockholder; that the lien of said executions should be released as against the property of said intestate, and one of them in favor of the administrators of Charles B. Sisson, deceased, be levied upon the property of W. B. Wofford, another stockholder; that the lands of plaintiff's intestate should be duly sold at administrator's sale and be bid off by Wier Boyd, Esq., as agent and trustee for both parties, with authority to dispose of said property at

private sale, and to retain a sufficient amount to pay off said execution, including the one in favor of the administrators of Sisson, deceased, should it not be satisfied out of Wofford's property; that the said agreement was not to prejudice the rights of either party upon the trial of the issue formed upon an affidavit of illegality filed to said Sisson execution, then pending in Lumpkin Superior Court; that the note sued on was given for land belonging to plaintiff's intestate, purchased at administrator's sale, by said Boyd, as trustee, as aforesaid, and sold by him to this defendant, with the understanding that the money, when due, should be paid on the Sisson execution, provided it was not satisfied out of Wofford's property, and provided the affidavit of illegality, filed thereto, was not sustained, neither of which contingencies happened; that defendant is ready to pay the money due on said note, to the Sisson execution, but the plaintiff refuses to carry out his said agreement; that the estate of Mason is insolvent, as are also the plaintiff and the sureties on his bond.

Prayer, that the verdict and decree be so moulded as to cause the money due on said note to be paid according to the terms of said agreement.

The evidence for the defendant made substantially the case set up in the plea. It further appeared that the illegality to the Sisson execution had been dismissed; that a motion to open the judgment upon which it was based was also made and dismissed, and that the execution in both instances was ordered to proceed.

The plaintiff sought to prove an agreement anterior to said illegality and to said motion to open the judgment, by which said execution was released as against the estate of Mason, deceased. The evidence was excluded and the plaintiff excepted.

The jury found a verdict for the plaintiff for the amount of the note sued on, and ordered that when paid it should be credited on the Sisson execution. A decree was entered accordingly.

Field vs. Price.

The plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in refusing to charge the jury as follows: "The plea and set-off filed by the defendant in this case cannot be sustained, because the claim he sets up is in the right of a third person against the plaintiff, and not in favor of said defendant."

2d. Because the Court erred in excluding the testimony above referred to.

The motion was overruled and the plaintiff excepted upon each of the grounds aforesaid.

WIER BOYD, for plaintiff in error.

W. P. PRICE; H. P. BELL, for defendant.

McCAY, Judge.

1. Whilst it was the settled rule at common law that an agent who made a contract for his principal could not sue upon it in his own name, yet the rule had exceptions. One of these was, that if the agent had an interest, as for commissions, etc., he might sue on the whole contract in his own name. A judgment upon it in such a suit, where the agent acts for both himself and the principal, binds both: See 1 Chitty on Pleadings, page 7, and cases cited. Here the contract is with Price, naming him as the agent. Price clearly has an interest. He was employed by the principal to collect. He has, therefore, *prima facie* commissions. But he is specially interested, because, unless he can save this money, he may be liable to his principal for it. We think, therefore, that Price might file this plea—a *quasi* bill in equity—which he may do under our practice of mingling law and equity.

2. We are clear, too, that a fair construction of the written agreement includes the Sisson *fi. fa.* as among those which were to share in the proceeds of the lots, should it fail to be satisfied out of Wofford. Indeed, we do not see how any other meaning can be put on the words used in the agree-

Field vs. Price.

ment. The special provision for the payment of the other *fi. fas.* out of the first money is rather in furtherance of, than contrary to, this view, since, if they were to be first paid, the indication is pretty clear that *something* was to be second. And as, by the terms of the agreement, the Sisson *fi. fa.* was to be used with the hope of getting the money to pay it out of Wofford's property, the inference is strong that if this hope failed, it, the Sisson *fi. fa.*, was to be the second referred to. We do not think Mr. Price's testimony is in conflict with the note. He testifies only that the note was given for the land. He shows that Boyd bid off the land, as the written agreement provided; that *he* bought the land afterwards from Boyd, and gave this note, payable to the administrator, for the purchase money. All this testimony proves is, that this note represents the proceeds of the land sold under the agreement. It does not contradict the note; it only undertakes to identify the consideration for which it was given, and to fix it as part of the proceeds, which, by the written agreement, was to be disposed of in a particular way. This plea sets up no off-set. It does not claim that the note shall be met by the *fi. fa.* and declared satisfied; nor have the jury so found. They have, in fact, found for the plaintiff the principal and interest on the note, but they have, as a Court of equity, directed that the money, when collected, shall be paid to and be credited on the Sisson *fi. fa.* We think the verdict was right. The plea is an equitable defense. Price, as the agent of the plaintiffs in the *fi. fa.*, and for himself, might have filed a bill to stop this fund and have it paid to the plaintiffs in the *fi. fa.*, according to the agreement. His interest justifies him in doing this, and the case is to be looked at as though these plaintiffs had, in fact, filed a bill for this purpose. The verdict is just such a verdict as ought to have been found on such a bill.

3. For the same reason, the charge of the Court, as to the effect of the several judgments and orders of the Court, is not illegal. In this trial, Price acts for himself and his principals. He stands on their rights, and the jury were to try

Finney vs. Tommey & Stewart.

the case as though these principals were parties. Surely, the administrator, Field, who made the contract to which Lester and Brown testify, cannot now set up this agreement after he has suffered two judgments overruling illegalities filed by him, and after he has permitted this order reserving the lien of the *Sisson fi. fa.* He is estopped, after contending for ten years against the *fi. fa.*, and after twice suffering judgments ordering it to proceed, from setting up a defense which he knew all the time existed, and which he did not assert. To allow this to be done is trifling with the time and patience of the Courts. And if the evidence, as it did, showed such judgments to have been rendered, it was not improper for the Judge to tell the jury that they were of far stronger weight than parol evidence. He might have gone further and said they were conclusive; that they settled the question as to the validity of the *fi. fa.* at the time they were rendered.

Judgment affirmed.

ANDREW T. FINNEY, plaintiff in error, vs. TOMMEY & STEWART, defendants in error.

Two cases were pending between the same parties. They were submitted together to the Court upon an agreed statement of facts. The Court dismissed one case and allowed a judgment to be taken in the other. The plaintiffs excepted to said judgment, and brought the same for review to this Court, and obtained a reversal. The legal effect of this reversal was to leave no judgment in the Superior Court, and to place the parties in the same position in which they were before the submission.

Judgments. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

This is the second time this case has been before the Supreme Court: See 45 *Georgia Reports*, 155.

For the facts, see the decision.

L. J. WINN, for plaintiff in error.

HILL & CANDLER, for defendants.

WARNER, Chief Justice.

The error complained of in this case is that the Court below overruled the defendant's plea in bar of the plaintiff's suit and ordered the same to be stricken. It appears from the record that the plaintiffs had sold goods to the defendant, and had instituted a suit on a part of the account in a Justices' Court, (to-wit,) for the sum of \$88 47, and obtained judgment therefor, from which judgment an appeal was taken to the Superior Court. It also appears that the plaintiffs subsequently instituted suit against the defendant in the Superior Court for the balance of their account, to-wit: for the sum of \$121 37. Both cases were pending in the Superior Court, the one on the appeal, the other on the common law docket. The defendant filed a plea in abatement of the pendency of a former suit for the same account to the last action instituted in the Superior Court, but did not file it at the first term of the Court. The parties entered into an agreement to submit the two cases together to the decision of the Court upon an agreed statement of facts. On hearing and considering the two cases, as submitted by the parties on the agreed statement of facts, the Court dismissed the suit instituted in the Superior Court for the recovery of that portion of the account included therein, and allowed a judgment to be taken in the other case, which is now pleaded in bar. From that judgment of the Court the plaintiffs sued out a writ of error to this Court, and upon the hearing thereof the judgment of the Court below was reversed, the legal effect of which was to place the two cases exactly in the same position as they were when submitted to the judgment of the Court by the agreement of the parties. There was no final judgment then which the defendant could have pleaded in bar of the plaintiff's action. The judgment of the Court covered both cases submitted under the agreement, and when that judgment was re-

versed there was no judgment in existence to be pleaded in bar, and if one had been entered up in the appeal case the judgment of reversal by this Court vacated it. There was no error in striking the defendant's plea in bar on the statement of facts disclosed by the record.

Let the judgment of the Court below be affirmed.

GUS PETERSON, plaintiff in error vs. THE STATE OF GEORGIA, defendant in error.

When there was a trial on an indictment for murder, and the prisoner was found guilty and the evidence showed that the killing was without justification or sufficient excuse, and after a motion for a new trial was made and overruled, it was discovered that defendant could prove that deceased had, a few days before the killing, said he intended to kill prisoner, and had borrowed a pistol, expressing such intent, but it did not appear that at the time of the killing the prisoner was informed of such threats of the deceased:

Held, That it was not error in the Circuit Judge to refuse a new trial on the ground of this newly discovered evidence.

Criminal law. Threats. New trial. Before Judge STROZER. Dougherty Superior Court. June Term, 1873.

Gus Peterson was tried and convicted of the offense of murder at the June adjourned term, 1872, of Dougherty Superior Court. He moved for a new trial, the motion was overruled, and the case brought by writ of error to this Court, where the judgment was affirmed: See 47 *Georgia Reports*, 524. At the June term, 1873, of Dougherty Superior Court, he petitioned substantially, as follows:

Since the last regular term of this Court, he has discovered that he can prove by one Eli Outlaw that the deceased, John Simas, four days previous to the homicide, tried to borrow a pistol to use on petitioner and threatened to kill him; that at several times and to different persons, he made similar threats. These declarations and threats of deceased, if heard by the jury, would have shown his *animus* and motives at the

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Peterson vs. The State of Georgia.

time of the killing, and would have explained his eagerness to engage in combat. This evidence was unknown to petitioner or his counsel at the time of his trial and the motion for a new trial. He and his counsel have not been wanting in the necessary diligence. Prays that a rule *nisi* may issue, requiring the State to show cause why a new trial should not be granted.

This petition was supported by the affidavits of the witness, and of petitioner's counsel.

The Court refused to order the rule *nisi* to issue, and petitioner excepted.

D. H. POPE, WILLIAM E. SMITH, LYON & IRVIN, for plaintiff in error.

B. B. BOWER, Solicitor General, for the State.

MCCAY, Judge.

There is nothing in the original record of the evidence on the trial of this case to make this newly discovered evidence of such significance as to authorize a new trial. There is no pretense that it would *justify* a verdict of justifiable homicide, since the defendant did not know of it at the time, and could not have done the killing through any fears aroused by his knowledge of it. Nor does the evidence show any such overt acts of the deceased at the time of the killing, as this evidence would illustrate. In *Keener's case*, 18 *Georgia*, where evidence of this character was held admissible, there was much in the deceased's conduct, during the day, and just before the killing, which the evidence of threats would have strikingly illustrated. The Keener case carries the question of the admissibility of such testimony to the point of extreme liberality, and is difficult to reconcile with *Howell's case*, 5 *Georgia*, and *Monroe's case*, 5 *Georgia*. We do not feel authorized to go any further in the direction of the Keener case than its terms require. See *Hoye's case*, 39 *Georgia*. The proof, on the trial of the prisoner, who now asks for a new

Wimberly vs. Collier.

trial, shows no act of assault by the deceased, or any indication of such an intent. His coming to the door and out to the point where he was killed, was at the invitation of the prisoner, and after language of the prisoner from which even expressed malice, evidenced by threats, appears. Nor does the evidence show the least act on the part of the deceased authorizing a belief in the prisoner that the deceased intended violence, but rather the contrary.

There is entirely too reckless a disregard of human life in the land, and we would be false to the high trust committed to us, should we relax the rules that experience has laid down for the discovery of the truth in such cases through any mawkish sympathy for the man slayer. A stern, though kind enforcement of the law, is the only protection society has, and the times require the ministers of justice to be true to the demands of the law upon the guilty. It is not sufficient to reduce a killing from murder to manslaughter, that hot words have passed between the parties, that the passions of the man slayer were aroused by "threats, menaces or contemptuous gestures." There is, it is true, no remedy, if a jury, under their right to judge of the law and the facts, shall say by their verdict that the case is not murder, but something less, or even nothing. But the law is definitely set forth in the Code; and it is the duty of the Courts, who are only judges of the law, to enforce it.

Judgment affirmed.

HENRY S. WIMBERLY, trustee, plaintiff in error, vs. NEEDHAM W. COLLIER, defendant in error.

1. Where there is no evidence that the defendant was in possession of property before or after the judgment was rendered against him, and no title was shown in him, the fact that he conveyed the same by deed subsequent to said judgment, and possession was taken thereunder by the vendee, does not render the property liable thereto.
2. An immaterial error is no ground for new trial.

Claim. Judgment. Title. New trial. Before Judge STROZIER. Dougherty Superior Court. April Term, 1873.

For the facts of this case, see the decision.

H. MORGAN, for plaintiff in error.

VASON & DAVIS ; R. F. LYON, for defendant.

WARNER, Chief Justice.

This was a claim case, and on the trial thereof in the Court below, the jury found a verdict in favor of the claimant. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the plaintiff excepted. It appears from the evidence in the record that the plaintiff obtained a verdict on the trial of a case at common law against the defendant, Collier, upon which verdict judgment was signed and dated 11th June, 1857. An appeal was taken from that common law verdict, and the case was tried on the appeal, a verdict rendered, and judgment signed thereon at the December term of the Court, 1866. An execution issued upon this last and final judgment, and was levied upon the property in dispute as the property of Collier, which was claimed by Rust, who claimed it under a chain of title derived from Collier, under a deed executed by him to Moughon, dated 29th June, 1860. The plaintiff in the execution sought to make the property levied on subject thereto, on the ground that all the property of Collier was bound from the signing of the judgment on the first common law verdict, so far as to prevent an alienation of the same. The Act of 19th December, 1822, (Cobb's Digest, 496,) declares that when an appeal is entered from the first verdict, the property of the party against whom the verdict was rendered, shall not be bound, except from the signing of the judgment on the appeal, except so far as to prevent the alienation by the party of his, her or their property, between the signing of the first judgment and the signing of the judgment on the appeal. There is no evi-

Polhill *vs.* Neal *et al.*

dence in the record that the property levied on was ever in the possession of Collier before or after the signing of the first judgment on the common law verdict on the 11th of June, 1857, and no title to the property was shown to have been in him before or at that date. But it is said that inasmuch as Collier conveyed the title to the property to Moughon in June, 1860, and he and his son-in-law, Taylor, took possession of the property from Collier, under that deed, the Court should presume that the property was Collier's property on the 11th June, 1857, when the judgment was signed on the first verdict. This Court cannot legally make such a presumption from the facts, for it may well have been that Collier purchased the property subsequent to the time of the signing the judgment in 1857, and that judgment only prevented him from alienating such property as he *then had*. There being no evidence in the record going to show that the property levied on was the property of Collier, the defendant in execution at the date of the signing of the judgment on the first verdict in June, 1857, the verdict in favor of the claimant was right under the law and facts of the case, notwithstanding the Court may have committed some errors in its rulings at the trial.

Let the judgment of the Court below be affirmed.

BENJAMIN M. POLHILL, guardian, plaintiff in error, *vs.*
JOHN NEAL *et al.*, defendants in error.

Where a bill was filed to marshal the assets of an insolvent estate, and among the debts due by the deceased was one due as guardian of his two daughters, both of whom were married at the death of the father, and the husband of one of the daughters was a party to the original bill, charged with wasting the assets to a large amount, and pending these proceedings, the two daughters, by their next friend, came in and were made parties, by petition, setting up the debt due them by their father, and praying that it should be settled to their sole use, and before any final decree, one of the daughters died, leaving minor children:

Polhill vs. Neal et al.

Held, That the right to a settlement was sufficiently asserted by the mother during her lifetime, to authorize the children to come in by petition and assert the right for their own benefit as survivors.

Equity. Survivorship. Parties. Before Judge KIDDOO. Mitchell Superior Court. May Term, 1873.

Allen Cochran died in November, 1863, leaving two daughters, to-wit: Medora Wade, wife of Ethel B. Wade, and Mary J. Polhill, wife of Frederick T. Polhill, both of whom were married prior to the death of their said father. The deceased left a plantation, slaves and personal property. The plantation and slaves were lost to the estate. A part of the personal property, to-wit: ninety bales of cotton, was sold by Frederick Polhill, thirty-seven bales of which were delivered to the purchasers and lost to the creditors, the balance being levied on by divers executions against the deceased.

Cochran, during his life, was the guardian of his said daughters, and was indebted to them, as such guardian, in about the sum of \$7,000 00. John Neal, a judgment creditor, filed a creditor's bill against Frederick T. Polhill, M. D. Potts, administrator *de bonis non, cum testamento annexo*, of Cochran, and others, to condemn the cotton sold by Polhill, and other property sold by Cochran during his life, and generally to marshal the assets of the estate. Mrs. Wade and Mrs. Polhill were made parties to said bill, and, as creditors, set up their claim against the estate of their said father, averring that it was superior in dignity to all others. They prayed such decree in their favor as the law and principles of equity would justify, settling the amount recovered in trust for their sole and separate use respectively, and suggested their husbands as suitable trustees.

The administrator of Cochran answered these charges and set up, by way of cross-bill, the amount of the estate of the intestate which had been received and used by Polhill, Wade, their wives and children, which was far in excess of the aforesaid claims. He also charged that said indebtedness of the

Polhill *vs.* Neal *et al.*

deceased, as guardian, had vested in the husbands of his former wards.

Pending the issue thus formed, Mrs. Polhill died, and her children, through Benjamin M. Polhill, guardian *ad litem*, by supplemental bill, prayed to be made parties in place of their deceased mother. The Court refused the application, and said guardian excepted.

J. RUTHERFORD, by R. H. CLARK ; A. D. HAMMOND,
for plaintiff in error.

LYON & IRVIN ; VASON & DAVIS, for defendants.

McCAY, Judge.

The only precise point of the objection made to the children of Mrs. Polhill becoming parties to this bill is, as we understand it, as follows: In the petition of Mrs. Polhill, filed during her lifetime, by her next friend, there is, 1st. No express statement that she claims her wife's equity. 2d. There is no allegation of the facts necessary to enable the Court to judge whether she ought to have any settlement, and how much. 3d. That she does not in that petition include her children. For these reasons it is said that, as she has not in her lifetime asserted any equity for her children, they are not now entitled, since they can only come in as survivors, to an assertion of right made by her for them during her lifetime: 6 Beavan, 344. We do not assent to the positions from which this inference is drawn. In the first place, this debt of Mr. Cochran to his daughters is a trust debt; the fund, too, out of which it can alone be paid is in the custody of a Court of chancery. The husband or his creditors, who seek to get it have come into equity to assert the marital rights of the husband. In such cases, a Court of equity will, without a petition, impose terms upon the husband, and will not lend him its aid until he himself offers to make a settlement, or affirmatively shows the wife's assent to his reduction of the equitable claim in action to his possession: 2 Vesey, Sr., 669,

672; *Brown vs. Elton*, 3 Peere W., 204; *Blount vs. Bestland*, 2 Vesey, Jr., 515. See also, *Elliot vs. Cordell*, 5 Madd. 156.

Again, Polhill, the husband, was already a party, and the very object of the bill in the stage of it when her petition was filed, was to dispose of the fund, and to off-set the trust claim of Mrs. Polhill, by a charge of Polhill's malfeasance, and thus get a decree in direct antagonism to Mrs. Polhill's equity. The insolvency of Polhill is the very basis of such a claim, and in making herself a party to the bill Mrs. Polhill need only make such statements, as to her rights, as do not clearly appear by the record. That her petition does not in terms call the rights she asserts, her equity to a settlement, does not, as we think, alter the case. The record shows that her rights, if she has any, is her wife's equity, and we hardly think equity proceedings require, when the facts appear, a complainant to designate the claim by any particular name, or to specify the principle of law under which the rights arises. Nor was it necessary for the childrens' rights that the mother should specially ask a settlement which would include them. The Court, in its decree, would include them whether she asked them or not: 1 Beavan, 593; 6 Simmons, 584; 1 Kean, 132.

Under sections 1710 and 1711, of the Code of 1863, the rights of the wife to a settlement of her claims in action, is very broadly asserted, both for herself and her children. It would seem from section 1710, that the wife need not even wait until the husband, or creditors, or assignees, attempt to reduce the claim into possession, but that she may apply independently. Section 1711, in distinct terms, provides for the childrens' right of survivorship, and we are not prepared to say, under these sections, that in this State the right of the children depends on the assertion of the wife during her life. This section does not put the right of the children on any such terms, but broadly declares, "If the husband be insolvent, the wife's equity survives to her children, if any."

We think, therefore, the children have a right to come into this litigation, as they, by their next friend, propose, and that, if their mother would have been entitled, under the rules of

equity, to a settlement for herself and them, that right still exists for them.

Judgment reversed.

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AMELIA MURPHY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

WILLIAM CHAMBERS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Upon trials for the offense of bigamy, and for marrying another man's wife, proof of the previous marriage, in fact, is sufficient without the production of the license from the Ordinary, or evidence that the person executing the same was an ordained minister of the gospel.
2. This Court can only pass upon judgments rendered by the Court below.

Criminal law. Bigamy. Evidence. Practice in the Supreme Court. New trial. Before Judge HOPKINS. Clayton Superior Court. March Term, 1873.

The foregoing cases were argued and decided together. To the bill of exceptions in each are attached various affidavits, which would seem to be the basis of motions for new trials on account of newly discovered evidence. But the records disclose no such ground as taken or passed upon by the Court.

The remaining facts appear in the decision.

A. W. HAMMOND & SON; SPEER & STEWART; J. L. DOYAL; W. L. WATERSON, for plaintiffs in error.

JOHN T. GLENN, Solicitor General, for the State.

WARNER, Chief Justice.

Amelia Murphy was indicted for the offense of bigamy, and William Chambers was indicted for the offense of marrying another man's wife. Both were found guilty, and a motion for a new trial in each case was made, on the grounds set forth

Murphy vs. The State of Georgia.

in the respective motions therefor, which were overruled, and the defendants excepted.

1. Both cases were argued together before this Court, and the only question made was whether Amelia Murphy was a lawful married woman at the time Chambers married her. The marriage of Amelia and Jack Murphy was proved by witnesses who were present at their marriage, and that they were married by a preacher and minister of the gospel, who said he had a license to marry them, but no license was produced or offered in evidence. It is insisted that, in order to prove a legal marriage of the parties a license from the Ordinary should have been proven at the trial, and that the minister who married them was an ordained minister of the gospel. In *Cook vs. The State*, 11 *Georgia Reports*, 54, this Court held that in prosecutions for bigamy, adultery, or incestuous adultery, that the admissions of a defendant as to the fact of his marriage were admissible in evidence, and that it was not necessary to prove a marriage in fact. In that case, the point was made that the marriage should be proved by the record of the license and return thereon. In this case, the marriage is not proved by the admissions of the defendant, but a marriage in fact is proved by the witnesses who were present at the time it took place. On the authority of *Cook vs. The State*, the marriage of Amelia and Jack Murphy was a lawful marriage, according to the evidence, without proof of the license from the Ordinary. The 1708th section of the Code declares that a marriage, valid in other respects, and supposed by the parties to be valid, shall not be affected by a want of authority in the minister, or Justice, to solemnize the same.

2. The record does not show that a motion was made in the Court below for a new trial on the ground of newly discovered evidence, or that the Court rendered any judgment as to that ground, in either case. The verdict in both cases being right, under the law and the evidence, the motion for a new trial in each case was properly overruled.

Let the judgment of the Court below, in both cases, be affirmed.

Stancel vs. The State of Georgia.

W. R. STANCEL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When there was an indictment for compounding a felony, and it appeared that the defendant had suffered serious damages from an assault with intent to murder by one Boston; that he had sued out a warrant against Boston, who was arrested and recognized under said warrant; that one Morrow, as the friend of Boston, had applied to defendant to settle the case; that defendant had declined to settle, except for the damages, stating that if he settled the whole, he should have to absent himself from Court; that subsequently, Mr. Doyal, who was defendant's attorney in the suit for damages, had, without any special authority from defendant, and in his absence, settled with Boston for the damages; that in this settlement it was distinctly stated and stipulated that there was no settlement of the prosecution, although, as was then by the written settlement stated, the defendant expressed himself as satisfied, and suggested to the public officers this satisfaction as a matter for their consideration. It further appeared that the defendant was not present at Court at the next term after the assault, although the bill was found on the testimony of other witnesses who were present at the assault. It further appeared that the defendant had received the money paid to Doyal:

Held, That there was not, under the law, sufficient evidence to justify a verdict of guilty, especially as it did not appear that the prosecution was, in fact, discontinued, or that Mr. Doyal acted at all on the proposals of Morrow, or that the absence of defendant from Court was in pursuance of any understanding with any one that he should be so absent.

Criminal law. Compounding a felony. Before Judge HOPKINS. Clayton Superior Court. March Term, 1873.

Stancel was placed on trial for the offense of compounding a felony, to-wit: an assault, with intent to murder, perpetrated upon him by one Harvey W. Boston. The defendant pleaded not guilty.

The evidence made substantially the following case:

About January 16th, 1871, Boston shot Stancel through the elbow, saying as he fired, "God damn you, I will kill you." This occurred in the office of the Ordinary, in Clayton county. Boston was arrested and confined in jail. He was subsequently carried before a magistrate, waived examination, and was committed for the offense of an assault with

Stancel vs. The State of Georgia.

intent to murder. J. L. Doyal, Esq., was employed to institute an action for the damages sustained by Stancel by reason of said assault.

Boston and his wife requested R. A. Morrow to settle the whole matter. He saw Stancel on the subject; he said he would settle the matter for \$1,000 00. Morrow replied, that Boston could not pay that much money. These negotiations were pending for several days. At last Stancel concluded that he would take \$500 00 in settlement. All of the money could not be raised. Morrow said that he would be responsible that it should all be paid. Stancel replied, that he would take nobody's word for it, that if he settled he would have to absent himself from Court, and he must have the money. He said he would settle it for \$500 00, but at the same time he always talked about it as for damages. Morrow was endeavoring to settle the matter in full, criminal case as well as civil. It was Morrow's understanding that if the matter was settled, Stancel would absent himself from Court. The failure on the part of Boston to raise the money defeated the proposed settlement.

Doyal had been Stancel's attorney in other cases. He requested him to represent the State in the prosecution of Boston. The settlement, as appears by the following instrument, was made by Doyal:

"Received, Jonesboro, March 6th, 1871, of Harvey W. Boston, \$400 00, as follows: \$350 00, and an order on George Mansfield for \$50 00. And this to be a receipt in full of all damages which have accrued to me in and from the wounds inflicted by him, including lawyer's fees, doctor's bill, lost time, etc., and I hereby express myself fully and entirely satisfied and at peace with said H. W. Boston, and have no earthly desire to see him punished for the offense, if offense it be, and desire that the Court and country shall construe my feelings as liberal as possible, not in any event to be construed so as to implicate me for compounding or suppressing crime.

(Signed)

"JOHN L. DOYAL,
"Attorney for W. R. Stancel.

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"Also my notes for \$100 00, house rent, which he holds, making in all \$500 00.

(Signed)

"J. L. DOYAL,

"For W. R. Stancel."

The \$350 00 mentioned in the above receipt was paid by Doyal to the defendant; the \$50 00 collected on the order on Mansfield he retained in satisfaction of professional services previously rendered. The defendant knew where the money came from. He had left the matter in Doyal's hands to make any settlement which would not implicate him. He did not give Doyal special authority to collect the money paid from Boston. Doyal did it under his general authority as an attorney. Defendant told Doyal that he must make no settlement which would compound a felony; that he did not wish to be so complicated as not to prosecute Boston; that he did not propose to sell his blood for money. Doyal read to defendant a decision of the Supreme Court of Georgia, in reference to compounding felonies, for the purpose of showing him that he could not settle the prosecution; that if he took notes for the damages, Boston could defeat a recovery on them. Stancel was not present at the settlement. The amount stated in the receipt embraced some fodder and corn for which Boston was indebted to defendant. It was a full settlement of all matters between them except the criminal prosecution. Defendant was absent from the Court at the term after the assault made upon him. The true bill against Boston was found upon the evidence of others.

The jury found the defendant guilty. A motion was made for a new trial upon the ground that the verdict was contrary to the evidence. The motion was overruled and the defendant excepted.

A. W. HAMMOND & SON; A. W. HEAD; W. H. HEAD; SPEER & STEWART; J. L. DOYAL, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

McCAY, Judge.

We are at a loss to discover from this record the ground upon which the verdict of guilty was found. We do not impute any prejudice to the jury ; but we cannot but think there was some gross misconception, or that the truth of the case is not in the record. We see nothing to justify the verdict, under the law. The statute (Revised Code, section 2999,) expressly authorizes the injured party, even if the *tort* is a crime, "to recover compensation for the personal injury;" provided there is no attempt to satisfy the public offense, or to suppress the prosecution.

The proposition of Morrow and the defendant's reply, has no significance, for the simple reason that no action or settlement was then made, nor is there *any* evidence that the action of Doyal was in pursuance of that conference. Indeed, Doyal testifies directly the contrary of this, as he says he acted, after deliberate conference with the defendant, in which it was distinctly understood that the prosecution was *not* to be settled, and that, in the actual settlement, he acted without any special authority, but solely upon his authority as attorney at law, to settle the civil suit. The expressions, in the written settlement of the personal satisfaction of the defendant, and the suggestion to the authorities of that fact, for their consideration in their action towards Boston, is not only not illegal, but is what Stancel might openly and forgivingly say on the stand before the jury. Nor is the simple absence of Stancel from Court at the time the bill was found, sufficient, unless it appeared that it was concerted and a part of the understanding at the time of the settlement. He may have been absent for good reasons, independently of this matter altogether ; and if that absence was no part of the consideration for the money received, it would not, of itself, be a crime.

We see in the evidence nothing to justify the verdict. The defendant seems to us to have been *very careful* not to violate the law ; and, so far as the record shows, it is clear to us that he did not do so. Judgment reversed.

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MACON AND BRUNSWICK RAILROAD COMPANY, plaintiff in error, *vs.* THE STATE OF GEORGIA, *ex rel.* JOHN H. PATE, defendant in error.

Justices of the Peace have not jurisdiction, under the provisions of the 4023 section of the Code, to abate as a nuisance a bridge constructed by a railroad company over a navigable stream.

Nuisance. Justices of the Peace. Jurisdiction. Rivers. Railroads. Before Judge COLE. Pulaski County. At Chambers. December 26th, 1872.

For the facts of this case, see the decision.

WHITTLE & GUSTIN, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an application made by Pate, as relator in behalf of the State, to two Justices of the Peace in Pulaski county, to have a bridge, constructed and maintained by the Macon and Brunswick Railroad Company, across the Ocmulgee river in said county abated as a public nuisance, alleging that said river is a public highway and navigable stream, and that said bridge tends to the immediate annoyance of the citizens in general, as it is an insufferable barrier and obstruction to the navigation and use of said river. When the case was called before the Justices, the defendant demurred to their jurisdiction to abate the nuisance, as prayed for, which demurrer was sustained. The plaintiff sued out a *certiorari* and brought the case before the Superior Court, and upon the hearing thereof, it sustained the *certiorari* and remanded the case back to the Justices with instructions to submit the question of nuisance to twelve freeholders, according to the provisions of the 4023d section of the Code; to which ruling of the Court the defendant excepted. The question made in this record is, whether the two Justices of the Peace had the power and au-

Moore vs. Stone.

thority, under the law, to abate the nuisance complained of, under the provisions of the 4023d section of the Code. The nuisance complained of does not tend to the immediate annoyance of the citizens in general, because it is manifestly injurious to the public health and safety, or because it tends greatly to corrupt the manners and morals of the people, but it is the alleged obstruction of a navigable river by the erection and maintenance of a railroad bridge by a chartered corporation of this State. In our judgment, the Justices of the Peace did not have jurisdiction and authority to abate the nuisance complained of, as provided in the 4023d section of the Code, the same not being such a nuisance as is contemplated by that section, or embraced within it: See *South Carolina Railroad Company vs. Moore & Philpot*, 24 *Georgia Reports*, 418.

Let the judgment of the Court below be reversed.

JOSEPH W. MOORE, plaintiff in error, vs. WELCOM A. STONE, defendant in error.

1. The Court erred in charging the jury that if the first and second contracts had been abandoned, the jury must find according to the testimony of L. Moore.
2. The verdict is for too much, even under the evidence of L. Moore, as it is set forth in the record.

Charge of Court. New trial. Before Judge ANDREWS. Taliaferro Superior Court. May Term, 1872.

Stone brought complaint against Moore upon an account for \$1,527 48.

The defendant pleaded the general issue, and further, that he and plaintiff contracted, in December, 1868, to farm together for the year 1869. Defendant was to furnish the land and plow-stock, and feed for same; plaintiff was to hire the laborers, feed them, and also superintend the farm; and by the said contract, the crop made for the year last aforesaid

was to be divided equally between the plaintiff and defendant, after the other expenses of making the same, not above set forth, were paid out of said crop. The parties aforesaid proceeded under said contract until about the 1st day of April, 1869, when the plaintiff threatened to abandon the plantation and remove to another, which he said he had rented or could rent, whereupon, the parties aforesaid entered into another contract, and agreed: 1st. That the stock of each was to be appraised and to be made equal in value, by a payment of money by that one who had a less amount of stock, and all the stock was then to belong to the parties aforesaid jointly. 2d. One-fourth of the corn and one-fifth of the cotton made during the year was first to be paid the defendant for rent. 3d. The laborers were to have one-fourth of the corn and cotton remaining. 4th. The remainder of the crop was then to be equally divided between the parties aforesaid, after paying all the other expenses of making the crop.

Under this last mentioned contract there were made eight hundred and forty bushels corn, nine thousand seven hundred pounds of fodder, twenty-five bales of cotton, sold for \$2,212 23, and eight hundred and forty bushels of cotton seed. This defendant has received ten bales of cotton, worth \$979 45, seventy-five bushels of corn, besides about fifty more fed to his hogs, worth in all about \$.....; one thousand two hundred pounds fodder, worth in all about \$....., and two hundred and ninety bushels of cotton seed, worth \$

This defendant furnished to make said crop five hundred bushels of corn, worth \$625 00, and twenty-one bushels, worth \$31 50; five thousand pounds fodder, worth \$75 00; seven hundred and ninety-four bushels cotton seed, worth \$158 80; five bushels oats, worth \$5 00, three bushels of peas, worth \$4 50; shucks, worth \$20 00; a lot of fodder and shucks from Ed Simpson, worth \$3 00, and blacksmith's work, worth \$30 00; making in all \$952 80, the one-half of which is still owing by plaintiff to this defendant.

This defendant further shows that the plaintiff is still due the defendant for his interest in said crop, over and above

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what he has received, the following items, to-wit: \$126 66 on the cotton; three hundred and seventy-one bushels of corn, worth \$556 50; three thousand nine hundred and fifty-nine pounds fodder, worth \$59 38, and one hundred and thirty bushels of cotton seed, worth \$26 00; making in all \$768 54.

All of the aforesaid items of indebtedness by the plaintiff this defendant sets off against his demands, and prays the Court to give him judgment, etc.

The plaintiff established his account by his own evidence. He also testified as to several particulars, in which the defendant failed to comply with his contract as set out in the plea.

The defendant testified substantially to the facts set out in his plea.

The plaintiff introduced one Lucius Moore, whose testimony was, in substance, as follows: "At the instance of Moore, he was present at a meeting of the parties to settle. Witness proposed that they settle on the basis of one-fourth of the corn and one-fifth of the cotton for rent; Stone to account for all the advances from Moore. Moore said to witness, 'Go to figuring on it.' The parties then walked out beyond the hearing of the witness, and after a little while came back, when defendant, Moore, said he was willing to settle on the basis proposed. The witness made a calculation upon the statement, as appears in the bill of particulars appended to the declaration, from items assented to by each party. When witness first run out the balance, he did it on the basis of one-fourth of both cotton and corn for rent; does not remember the amount of balance found against the defendant. It was something less than \$100 00. The defendant, Moore, then said he would not settle according to that basis. Witness carried his first statement home that night and corrected it, by allowing one-fifth of the cotton for rent. As they went along home together, defendant, Moore, said he would be losing \$500 00 to settle in that way. The bill of particulars is the same as the original statement made out by the witness, with the exception of correction aforesaid. Two

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other days were appointed for the parties to meet again to see if they could not settle, but they never met. The items in this account were agreed to by both parties. Witness never saw men agree easier on prices. Defendant, Moore, sat by and read over each item as set down by witness, and understood it.

The following is the statement prepared by Lucius Moore :

<i>Joseph W. Moore, to W. A. Stone,</i>	<i>Dr.</i>
1869. To 134 bushels cotton seed, 18c., \$34 12; 105 bushels corn, \$1 50, \$157 50.....	\$ 191 62
To 90 bushels corn, \$1 50, \$185 00; 123 bushels corn \$1 50, \$184 50.....	819 50
To 1,600 lbs. fodder, \$1 25, \$20 00; 1-5 bagging and ties, \$16 91.....	86 91
To proceeds sale 10 bales cotton, \$917 08; 297 lbs. lint cotton, 21c., \$62 89.....	977 45
	<u>\$1,527 48</u>
<i>Cr.</i>	
By 55 barrels corn, \$412 50; 5 bushels oats, 85c., \$4 25; 8 bushels peas, \$1 50, \$4 50.....	421 25
By 1,500 lbs. fodder, \$1 25, \$18 70; 442 bushels cotton seed, 18c. \$79 50.....	98 20
By 5 plugs tobacco, \$1 50; blacksmith's work, \$10; hire of mule, \$19 50.....	31 00
By interest on account, \$88 54; cash to Warren, Lane & Company, \$144 43.....	188 97
By cash borrowed, \$30 00; 1-5 proceeds 25 bales cotton \$429 27.....	459 27
	<u>\$1,198 89</u>
Balance due.....	334 09

The jury returned a verdict for the plaintiff for \$344 09. The defendant moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in charging the jury, "that if the first contract mentioned in the evidence was annulled by agreement of the parties, and the contract of April was never consummated and carried into effect, then that the jury should find a verdict according to the adjustment made, as testified to by the witness, L. Moore."

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2d. Because the Court erred in charging, "that the defendant, Moore, could not claim the benefit of the first contract testified to, if he did not perform his part of it—that is, if he did not furnish the stock as he contracted."

3d. Because the verdict is contrary to the law and the evidence.

A new trial was refused, and the defendant excepted.

GEORGE F. BRISTOW; JOHN C. REED, for plaintiff in error.

W. M. & M. P. REESE; W. H. BROOKE, for defendant.

MCCAY, Judge.

1. This, as appears by the record, is simply an action upon an account as for articles sold and delivered, though it is added in the writ that the account arose in certain dealings between the parties in making a crop together. The plea sets up that the parties had contracted to farm together, and had gone to work under the contract; that, in April, they abandoned their first contract and made another, and that a crop was made under this second contract. And the plea sets up, or attempts to set up, the rights of defendant under these circumstances as an off-set to the plaintiff's demand. The declaration and plea both confuse and confound the claims of both parties as individuals and as partners. Under our law, one partner may sue another at law, even concerning the partnership, if there has been a settlement; or, if he can make out his case, we see no reason why he may not charge him with a general balance and show that if a settlement were had, so much would be due. As an action to recover the balance due on a settlement of the affairs of the joint adventure, neither the declaration nor the plea makes out a case. Since each, in his account, sets up simply, not the balance due, but the separate claims of each, we are inclined to think, from the evidence, that neither of the two contracts can be enforced. The first, because it was abandoned; the second, because it was never carried into

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effect, and that, unless the statement of L. Moore proves a new contract, the real relations between these parties can only be settled on the principles of *ex equo et bono*. If L. Moore's testimony makes a new contract, then there ought to be no real difficulty. Stone is to be treated as a renter; as such, the *whole crop is his*, and Joseph Moore is to be charged with all he got of the crop, or all he has got, in any way, belonging to Stone, and is to be credited with all of his account against Stone for supplies and advances, including the hire of his mule, and a reasonable rent for his land.

The statement made out by L. Moore, if his evidence is to be taken, as a new contract, would perhaps be very fair, if it credited Joseph Moore with his one-fourth of the corn. We cannot find any such credit. The proof is that there was over eight hundred bushels of corn made. Joseph Moore is charged with having received a certain number of bushels, but he is credited with no rent corn. If he has to pay for what corn he has got he ought to be credited with his one-fourth rent. This, L. Moore's written statement fails to do, and it is that far incorrect, according to his own evidence, unless, indeed, the corn charged is what Joseph Moore got, over and above his one-fourth for rent, though this does not appear.

As the charge of Judge Andrews directed the jury, in case the other contracts were abandoned, to find a verdict according to L. Moore's testimony, and as they found exactly according to the account made out and balanced by him, and, as it appears to us, that this calculation does not (as it says nothing about the rent corn) cover the new contract he testified to, we think the verdict ought not to stand. We think, too, that it was improper in the Judge to say to the jury that they must find according to L. Moore's testimony. L. Moore's statement may be strong evidence, and a jury might very well be satisfied that the items and their prices, that day set down and agreed to, furnish a better rule for ascertaining the true amount of Joseph Moore's advances and receipts, than his present statements. But there is nothing in L. Moore's account of things that makes what was done that day

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an *estoppel* on either party, and it was not proper in the Judge to shut the jury up to the consideration of L. Moore's account of what took place, and to deny to them the right to *consider* defendant's present statement of what he furnished and what he got.

2. If we could see in this account made out by L. Moore, any credit to Joseph Moore for his rent corn, we should not send the case back, for his statement is very reasonable and fair, except that it seems to us he fails to allow Joseph Moore any rent corn. We may also say that we are unable to see how he got the final balance to be what he has made it. He says that he made it only \$100 00, counting the rent at one-fourth of the cotton, and that he changed this by only allowing one-fifth of the cotton. The difference between one-fourth and one-fifth of \$2,149 86, is \$98 19. If this be added to \$100, it only makes \$198 19, whilst the balance as it appears in the written statement is \$334 09. We cannot help thinking there is some mistake of L. Moore in both those particulars.

Judgment reversed.

WILLIAM SOLOMON *et al.*, plaintiffs in error, vs. MARTIN J. HINTON *et al.*, defendants in error.

The 4th and 29th sections of the Act of 1856, prescribing that after seven years, without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property for four years, it shall be discharged of the lien of any judgment against the person from whom he purchased, were parts of a statute of limitations in force on the 30th of November, 1860, and were, by the terms, spirit and intention of the Act of that date, suspended, and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war.

Statute of limitations. Judgment. Land. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

For the facts of this case, see the decision.

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HILL & CANDLER, for plaintiffs in error.

L. E. BLECKLEY, for defendants.

WARNER, Chief Justice.

The only question made in this case is, whether the execution under which the land was sold and purchased by the defendants, was dormant at the time of the sale, and that depends on the fact whether the statute limiting the time within which judgments should be enforced by executions issued thereon is a statute of limitations, and was suspended during the war. If it is a statute of limitations, and was suspended during the war, then the judgment and execution under which the land was sold was not dormant at the time of the sale. The Court charged the jury that the execution was dormant if, at the time the levy was made on the land, there was no entry made thereon by an officer authorized to execute and return the same within seven years next before said levy; to which charge the defendants excepted. The judgment was obtained on the 23d day of April, 1859, and execution issued thereon 6th of May, 1859, and was levied on the land 5th of March, 1867.

In view of the facts disclosed in the record, this charge of the Court was error. In the case of *Akin vs. Freeman*, 49 *Georgia Reports*, page 51, this Court held and decided that the 8th and 29th sections of the Act of 1856, prescribing that, after seven years without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property for four years, it shall be discharged of the lien of any judgment against the person from whom he purchased, were parts of a statute of limitations in force on the 30th of November, 1860, and were, by the terms, spirit and intention of the Act of that date, suspended, and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war.

Let the judgment of the Court below be reversed.

Hooper vs. Howell.

LOUISA S. HOOPER, plaintiff in error, vs. EVAN P. HOWELL,
guardian, defendant in error.

50	165
103	488
50	165
117	678
50	165
122	76

A wife's share of her deceased father's real estate, not distributed, but remaining undisposed of between the heirs, the same being wild lands, is not so in possession of the husband, as to bar the wife's right of survivorship, if he die before it is distributed or divided.

Husband and wife. Survivorship. Before Judge RICE.
Gwinnett Superior Court. March Term, 1873.

Hiram Pittman died in 1838, in Gwinnett county, leaving a widow and four children, one of whom, Louisa S. Pittman, afterwards Green, now Hooper, is the plaintiff in error.

Emily Pittman, another one of the heirs-at-law of Hiram Pittman, died in the year 1850, intestate, without issue, having never married.

In the year 1854, Louisa S. Pittman intermarried with W. A. Green, of Fulton county. By this marriage, there were four children. He died in 1859, and in 1869 his widow, the said Louisa S., intermarried with W. R. Hooper, her present husband, by whom she has two children.

Besides other property, Hiram Pittman left about two thousand acres of land in Gwinnett county. The interest of the said Louisa S. Hooper in these lands, as one of the heirs-at-law of Hiram Pittman, is the subject of this controversy.

C. C. Green and W. A. Wilson administered on the estate of W. A. Green, and were discharged without having done anything with the Gwinnett lands, except that one of the administrators once went to Gwinnett and looked at said lands. John Pittman, one of claimant's brothers, gave the other administrator some papers relating to the Gwinnett lands, showing title in Hiram Pittman. The claimant relinquished her dower in the "*lands of her deceased husband*," without specifying *what* lands.

In December, 1872, Evan P. Howell, guardian of the minor children of W. A. Green, the first husband of Louisa S. Hooper, obtained an order to sell the undivided four-fifths in-

terest of said minors, in certain described lots of land in the county of Gwinnett, as part of the estate of W. A. Green, deceased. Louisa S. Hooper claimed the property.

The lots described in the order of sale are numbers two hundred and eighty-nine, two hundred and ninety, half of lot two hundred and sixty-seven, and one-third interest in lot two hundred and thirty-eight, and one-third interest in lot two hundred and fifty-nine, containing in all seven hundred and forty-two and two-thirds acres, which are a part of two thousand acres left by Hiram Pittman.

On the trial, it was proved and admitted that the land in controversy was wild lands, before and during all the time of the first coverture, and were unenclosed and unoccupied. The guardian sought to prove by several witnesses that W. A. Green, in his lifetime, and after his marriage with claimant, spoke of the lands in dispute as belonging to him, and spoke of selling them. To this testimony the claimant objected, on the ground that it was not competent to show title in W. A. Green by his own sayings. The Court overruled the objection and admitted the testimony as showing verbal acts of ownership, and claimant excepted.

Counsel for claimant requested the Court to charge as follows:

1st. "That when a *feme sole* is entitled to property by inheritance, whether it be realty or personalty, upon her intermarriage in the year 1854, that inheritance was not cast upon the husband by his marital rights, in such sense as would vest the title in him, or in such sense as to defeat his wife's right to such inheritance upon his death, by survivorship, unless he reduced the property to possession during the coverture.

2d. "Merely speaking of the property as his, or speaking of making sale of it, would not be such reduction to possession.

3d. "That the marital rights of a husband who married in the year 1854 a *feme sole*, who was then entitled to property by inheritance from a father who died in 1838, or a sister who died in 1850, or both, attached only to that part of such

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inheritance, which, during the coverture, he reduced to possession, and this principle applies whether the inheritance be realty or personalty." Which requests the Court refused, to but charged "that the property in controversy being shown and admitted to be wild lands, whatever right the claimant had in them was cast upon and vested in her first husband, William A. Green, upon her marriage in 1854, and that being wild lands during the coverture, no reduction to possession by the first husband was necessary in order to cause his marital rights to vest in him such a title as that, and when he died the land went to his heirs-at-law, and not to his widow by survivorship."

The jury found for the guardian. There was a motion for a new trial on the ground of error in admitting the aforesaid testimony as to sayings of W. A. Green, and in the charge and refusal to charge.

The motion was overruled and the claimant excepted.

THOMAS W. HOOPER; HILLYER & BROTHER, for plaintiff.

PEEPLS & HOWELL; T. M. PEEPLS, for defendant.

McCAY, Judge.

The precise nature of the possession which constitutes a personal chattel *in possession*, so as that it passes completely to the husband on the marriage, is not clearly settled by the authorities. It is difficult to reconcile even the decisions of our own Court. In *Pope vs. Tucker*, 23 *Georgia*, 483, and in *Prescott vs. Peavy*, 29 *Georgia*, 59, Judge BENNING, in delivering the opinion of the Court, gives it as his judgment that a personal chattel belonging to the wife, though in the adverse possession of another, is in her possession sufficiently to defeat the right of survivorship. But this is contrary to numerous other decisions: 1 *Kelly*, 637; 3 *Ibid.*, 549; *Stephens vs. Bell*, 4 *Georgia*, 223. And Mr. Bishop says this position is contrary to both principle and authority: See Bishop on Law of

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Married Women, sec. 71, and authorities cited. But however the authorities may be in conflict upon this point, so far as I can find, they are uniform on a general principle which, we think, controls this case. When the interest of the wife is a share in an undistributed estate, the authorities are uniform that whilst it thus remains, the marital right of the husband does not attach: *Lewis vs. Price*, 3 Rich. Eq., 172; *Stewart vs. Stewart*, 31 Ala., 207, 216; *McCauley vs. Rodes*, 7 B. Mon., 462; *Wheeler vs. Moore*, 13 N. H., 478; *Hill vs. Hill*, 1 Strob. Eq. R., 1; 32 Ver., 775; 3 Sneed, 536; 10 Ver., 446. Such, too, has been the uniform ruling of this Court: *Bell vs. Bell*, 1 Kelly, 637; *Sayre vs. Flournoy*, 3 *Ibid.*, 549; *Chappel vs. Causey*, 11 *Georgia*, 24; *Lowe vs. Cody*, 29 *Ibid.*, 120. And this rule is founded on principle, since, in the nature of things, the share of the wife cannot be known. Her interest in any specific article is not defined. The law authorizes and requires a distribution, and one distributee may, in the division, get one article or one tract of land, and another get another. The principle applies to real as well as to personal assets. Our law makes it the duty of the administrator to distribute the one as well as the other: R. Code, secs. 2543, 2547. In this distribution, one may get personal property and another land. The question of advancements also arises, and debts due the intestate by the heir, all of which are to be adjusted in the distribution. The case does not stand, therefore, like a case of ordinary tenancy in common, where the title is complete in each to his undivided share.

Our law declares that the real estate shall go to the husband "as *personal property doth*:" Act of 1870, Cobb's Dig., 315. And our statute of distribution says, real and personal estate shall be considered as "precisely on the same footing." The language of the Act of 1789 is, that "real and personal estate shall *always* be considered, in respect to said distribution, as being *precisely* on the same footing, and in cases of intermarriage the real estate belonging to the wife shall become vested and pass to the husband in the same manner as personal property doth. And in case of the death of the

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husband thereafter, intestate and without will, shall descend and become *subject to distribution* in the same manner as personal property." This statute is the law which regulates the rights of these parties. Here is real estate. The wife had an interest in it. On her marriage with Green, the statute says it passed to Green exactly as if it were personal property; and at Green's death it became subject to distribution *precisely* as personal property. Had it been personal property, no person would for a moment contend that the marital rights of Green would attach, so long as it was undistributed. How, then, can this Court be authorized to say that, it being realty, it did pass though undistributed.

The present proceeding is a peculiar one. The guardian applies to the Ordinary for leave to sell. The mother comes forward and claims the property: Code, section 3690, 3691. We are aware that both parties came into Court on the assumption that the rights of either is to a specified portion of this whole tract of two thousand acres. But the proceeding is a peculiar one, and on the trial the truth of the case appears, to-wit: that the father of Mrs. Hooper was the owner of the whole, and as the rights of both parties are from him, we recognize the right of both to a full investigation of the whole matter. The verdict, as it stands, does not, under the facts as they appeared, decree the truth of the case. We are clear that if there was never any distribution of this land—any division of it between the heirs-at-law of Mr. Pitman, during the *lifetime of Green*—it survived, under the law, to Mrs. Green, now Mrs. Hooper. It does not *appear* that this was done. This verdict—indeed the case, as it comes into Court—assumes this to have been done. We think, therefore, the verdict does not do justice to the rights of the parties. We, therefore, give this direction to the case. We think this verdict ought to be set aside, and the case stand for a further hearing, so that either party may take such proceedings as to bring the whole case before the Court, making all persons at interest parties. If there was, in fact, during the lifetime of Green, a division or distribution of this land, recognized or

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agreed to by Green, or if it was divided under the law, on notice to him, we incline to the opinion that, it being waste land, it passed to him without more. But if he died before the share of Mrs. Green was ascertained, it survived to him.

Judgment reversed.

RICHARD P. GLENN *et al.*, survivors of GLENN, DUFFIELD & COMPANY, plaintiffs in error, vs. SAMUEL P. SALTER, defendant in error.

1. Where the defendant was sued on an account for money placed in his hands as the agent of the plaintiffs, and he pleaded that the plaintiffs had failed to give him credit for \$25,000 00, which had been repaid, it was competent for him to show that he had only discovered this omission upon the trial, and as a reason why it was not discovered earlier, to prove that large sums of money belonging to persons other than the plaintiffs, at the time he was their agent, passed through his hands, all of which money he kept together with that of the plaintiffs, being responsible for the amount charged against him by each firm, and that, though a large discrepancy in his general money balance was observed, yet, as said sum was repaid by another, the error was not discovered until it appeared from the evidence.
2. Where the evidence was conflicting as to what commissions the defendant was to receive as the agent of the plaintiffs in purchasing cotton, it was competent to show the compensation allowed by other parties to their agents engaged in the same business.

Principal and agent. Evidence. Before Judge HILL.
Houston Superior Court. May Term, 1873.

Richard P. Glenn *et al.*, as survivors of Glenn, Duffield & Company, brought complaint against Samuel P. Salter on the following account:

Mr. S. P. Salter, in account with Glenn, Duffield & Company.

1865.	Dr.	
July 12. To cash in currency ..		\$10,000 00
July 12. To cash in gold ..	\$ 1,400 00	
Aug. 8. To cash in gold ..	5,000 00	
Aug. 8. To cash in currency ..		5,000 00
Aug. 8. To cash in gold ..	20,000 00	
	<hr/>	<hr/>
	\$26,400 00	\$15,000 00

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CR.

Aug. By purchase 189 bales cotton, viz. : 90,583 lbs., with gold.....	\$14,009 94	
Aug. By purchase 1,021 lbs. cotton with silver...	234 88	
Aug. By purchase 20,170 lbs. cotton with cur- rency.....		\$5,761 98
Aug. By cash paid Mr. Wright.....		8,000 00
Sept. By purchase 43 bales cotton, 28,784 lbs., at 20 cents	4,756 80	
Oct. By cash of K. & H., gold.....	1,000 00	
Nov. By cash from Rust	6,000 00	
	<u>\$25,999 57</u>	<u>\$8,761 98</u>

RECAPITULATION.

Dr. To gold.....	\$26,400 00,	Currency.....	\$15,000 00
Cr. By gold.....	25,999 57,	Currency.....	8,761 98
Balance	\$ 400 48		\$ 6,238 07

STATEMENT.

Feb. 23. For balance due in currency, as per statement ren- dered.....	\$6,238 07
For balance due in gold, as per statement rendered...	400 48
Premium on \$400 48, gold, at \$1 49.....	196 00
Balance due Glenn, Duffield & Company.....	<u>\$6,834 50</u>

The defendant pleaded as follows: 1st. The general issue. 2d. That the plaintiffs employed him to buy cotton for them, and agreed to pay the usual commissions then allowed to agents for such services; and that he, in pursuance of such contract, purchased and contracted for, on plaintiffs' account, divers lots of cotton, for which he claimed commissions at the rate of two and one-half per cent. on the amount of purchases so made. 3d. That in pursuance of said contract with plaintiffs, he received from them, at different times, considerable sums of money, both in specie and in currency, for all of which he has fully accounted to plaintiffs, except the sum of \$5,-000 00, which was stolen from him in Albany, Georgia, about the 10th day of August, 1865, without fault or negligence on his part, of which loss plaintiffs were duly notified. To this plea was appended a statement of account between defendant and plaintiffs, exhibiting (as the plea states) "as accurately as

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he is able to do, the true statement of account existing at the commencement of said suit," and which the defendant prayed might be taken as a part of his plea, and according to which he claimed a balance due him by plaintiffs, of \$8,088 56, for which he asked judgment in his favor. The account appended to this plea is as follows :

BILL OF PARTICULARS.

Samuel P. Salter,

Agent of Glenn, Duffield & Company, in account with his said trust:

1865.

DEBIT.

To cash received for purchase of cotton, on account of said principal, as follows, to-wit:

July 12. In currency.....	\$10,000 00
July 12. In gold.....	\$1,400 00
Aug. 8. In gold.....	5,000 00
	<u>\$6,400 00</u>
Worth in currency, at \$1 50.....	9,600 00
In currency.....	5,000 00
In gold, on account of 1,500 bales cotton (Jerry Beall) \$20,000 00, worth, in currency.....	80,000 00
	<u>\$54,600 00</u>
Total amount received in currency.....	

1865.

CREDIT.

By amount of currency lost by agent in Albany, August 10, 1865.....	\$ 5,000 00
By amount paid for 189 bales cotton, viz.: 71,604 lbs., in gold and silver, \$14,242 77, worth, in currency.....	21,864 15
20,170 lbs., paid for in currency.....	5,761 98
By cash returned to Mr. Wright, (one of the plain- tiffs,) in currency.....	8,000 00
Sept. By 43 bales cotton, 23,784 lbs., paid for in gold, \$4,756 80, worth, in currency,.....	7,185 20
Oct. By cash by Knott & Howes, gold.....	\$1,000 00
Nov. By cash by Y. G. Rust, gold.....	6,000 00
	<u>\$7,000 00</u>
Worth, in currency.....	10,500 00
Total amount expended and accounted for...	<u>\$52,761 28</u>
Deducted from amount received, leaves balance in hand of agent	\$1,838 72

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Balance in hand of agent, on account of trust receipts and disbursements, as per foregoing exhibits, in currency value.....	1,888 72
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By service rendered in the premises, not hereinbefore accounted for, as follows, viz. : Commission on \$34,261 28, paid for 232 bales cotton, shown before, at 2½ per cent.....	856 53
Commission on \$134,630 00, paid for 1,000 bales cotton, bought of Lee Jordan, on account of plaintiffs, at 2½ per cent.	8,865 75
Commission on \$1,500 bales cotton, with Y. G. Rust, factor and commission merchant of Jerry Beall, at Albany, Ga., contracted for by defendant, at instance and request of plaintiffs, worth \$225,000 00, at 2½ per cent. commission.....	5,625 00
Agent's credits for commissions.....	\$9,847 28
Deducting balance in hand of agent on previous account.....	1,888 72

Balance due agent.....	\$8,008 56
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As a fourth plea, he alleged that in addition to \$34,261 28, paid out for plaintiffs, as exhibited in the account appended, and on which he claimed commissions as aforesaid, he claims to have purchased for plaintiffs one thousand bales of cotton, known as the "Lee Jordan cotton," amounting in the aggregate to about \$134,630 00, on which he alleges that he was entitled to commissions at the rate aforesaid. As a fifth plea, he alleged that in July, 1865, he contracted, with the approval of plaintiffs, for fifteen hundred bales of cotton, belonging to Jere Beall, with Y. G. Rust, his factor, at thirty cents per pound, making the aggregate value about \$225,000 00; that, as earnest money, he deposited with said Rust \$20,000 00 in gold, then worth \$30,000 00 in currency, to confirm the bargain; that plaintiffs were duly notified of this transaction, and approved it at the time, but that the contract was "afterwards, at their instance, and with consent of the said Jere Beall, cancelled." Defendant claims that, notwithstanding said cancellation, he is entitled to his commissions on said purchase, at the rate of two and one-half per cent.

Under these pleadings the case went to trial at August term, 1869, and resulted in a verdict for the defendant for \$3,737 09. Plaintiffs moved for a new trial, which was granted by Judge Cole, and the Supreme Court affirmed his

judgment, on the grounds stated in their decision in 42 *Georgia Reports*, 64.

At the December term, 1872, the case was again tried in Houston Superior Court, Judge Cole presiding. Before that trial, to-wit: on the 23d of October, 1872, defendant filed an amended plea, stating that his original plea of set-off, and the account annexed thereto, were prepared and made up principally from memory, without access to the books of account of the plaintiffs; that defendant at the time relied upon the account exhibited by plaintiffs to their declaration, but which he alleges in said amended plea is erroneous, in this, that it charges defendant on the 8th day of August, 1865, with \$25,000 00 in gold, which the plea alleges was advanced to defendant by plaintiffs, for the purchase, and in part payment of the fifteen hundred bales of the "Jere Beall cotton," and was paid to said Rust, factor of Beall, on said Beall purchase; that afterwards plaintiffs canceled said cotton trade with Beall, and the said \$25,000 00 was paid back to plaintiffs, or one of them, by the said Rust & Beall, but was not credited to defendant by plaintiffs. He claims said sum, therefore, as a just charge in his favor against said plaintiffs, and asks judgment for said sum, and also the sum of \$8,-008 56, claimed in his original pleas.

The evidence introduced upon the issues thus found was voluminous. It is omitted, for the reason that all that is necessary to an understanding of the principles enunciated by the Court, is embodied in the decision. The jury found for the plaintiffs \$4,977 97, with interest. The defendant moved for a new trial upon twenty-six different grounds, most of which were certified to be untrue by the presiding Judge. The only two grounds deemed necessary to be set forth were as follows :

4th. Because the Court erred in rejecting the testimony of the defendant, that he had on hand, at the time and during his agency for plaintiffs, large sums of money belonging to other persons, and that as much as \$500,000 00 passed through his hands during his purchase of cotton for plaintiffs, and

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that he kept it together, and was responsible to each separate party for the amount charged by each against him; that among these parties who furnished him with money were Knott & Howes, of Macon, with whom he was in partnership; that when he, defendant, came to settle with Knott & Howes, he expected to find them largely indebted to him, but, to his astonishment, they claimed, and their books showed, that he was indebted to them; that so great was his astonishment that he insisted that there must be some mistake, and the books were examined, and two days and nights spent by witness and the clerk of Knott & Howes in ransacking the books to discover the error, but, on strict scrutiny, they were found to be correct; that he, defendant, knew he was out a large sum of money, but never could tell where or how, till Rust's testimony in this case, that \$25,000 00 charged to him by plaintiffs, and which he, defendant, had paid to said Rust, was never paid back to defendant, but to Duffield, one of the plaintiffs; that this led him to scrutinize the account rendered by plaintiffs; to notice the charge of \$25,000 00, "Beall cotton" first rendered, and then "Beall cotton" obliterated, and to put in his claim for \$25,000 00.

7th. Because the Court erred in rejecting the evidence of Salter, Coleman, Howes, Rust and others, to the effect that agents for purchase of cotton at the time Salter was so engaged, were getting two and one-half per cent. all over Southern and Southwestern Georgia.

The motion was heard before Judge Hill, who succeeded Judge Cole, on the bench of the Macon Circuit. A new trial was ordered and plaintiffs excepted.

LANIER & ANDERSON; DUNCAN & MILLER; WARREN & GRIER, for plaintiffs in error.

NISBETS & JACKSON; S. HALL; S. D. KILLEN, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant on an account for money advanced to him to purchase cotton for them. The defendant pleaded a set-off for commissions, etc., and also a statement as to the disbursement of the money placed in his hands by the plaintiffs. The jury, on the trial of the case, found a verdict for the plaintiffs for the sum of \$4,977 79. The defendant made a motion for a new trial, on the several grounds stated in the motion, which was granted by the Court, on the first, second, fourth, seventh, tenth, fifteenth and twenty-fifth grounds set forth in the motion.

In our judgment, the new trial should not have been granted on the first and second grounds contained in the motion therefor. If the jury believed the plaintiffs' witnesses, (and that was a question for them exclusively,) the verdict was not strongly and decidedly against the weight of the evidence, nor contrary to the principles of justice and equity. The tenth, fifteenth and twenty-fifth grounds relate to the charge of the Court to the jury.

After a careful examination of Judge Cole's charge, as set forth in the record, we think the case was fairly submitted to the jury by that charge, in view of the evidence before them. There is nothing in that charge which, in our judgment, was calculated to mislead the jury. Therefore, the new trial should not have been granted on the tenth, fifteenth or twenty-fifth grounds of the motion therefor.

As to the fourth ground for a new trial, we are of the opinion the Court erred in rejecting the testimony of Salter in explanation of his transactions with Knott & Howes in relation to the money placed in his hands by the plaintiffs, going to show his mistake. What effect that evidence might have had on the minds of the jury when considered by them in connection with the other facts in the case, is another question. All that we decide is, that the evidence was admissible. The seventh ground for a new trial was the rejection of the evi-

dence of Salter, Howes, Rust and others, that at the time Salter purchased the cotton, other agents in Southwestern Georgia were getting two and one-half per cent. commissions. There was a conflict between the evidence of the plaintiffs and the defendant as to the commissions the defendant was to receive for purchasing cotton for them, the plaintiffs stating that he was to receive two and one-half per cent. on the price paid for small lots purchased from wagons, and \$1 00 per bale for large lots purchased; the defendant stating that he was to receive two and one-half per cent. on the price of all the cotton he purchased.

In view of this conflicting evidence, it was competent for the defendant to show what other agents received who were engaged in the same business at the time, as a circumstance in support of the truth of his statement, leaving the jury to believe his statement as to what was the contract, or the statements of the plaintiffs, as they might think proper. It does not necessarily follow that because other agents received two and one-half per cent. commissions, that the defendant did not make the contract, as stated by the plaintiffs; but as the evidence is in conflict upon that point, what other agents received for the same service, at that time, may be considered by the jury as a circumstance that he would not as probably have made a contract for less commissions than the customary rate, though he may have done so.

Inasmuch as the evidence specified in the fourth and seventh grounds of the motion was ruled out, we affirm the judgment of the Court granting a new trial, on those two grounds only.

Judgment affirmed.

Sanders & Son vs. The Town Council of Elberton.

JAMES A. SANDERS & SON, plaintiffs in error, vs. THE TOWN COUNCIL OF ELBERTON, defendant in error.

1. A town council having power to license and regulate the sale of spirituous liquors, may legally, in issuing a license, confine the sale of liquor to a particular room in a house.
2. Whether two rooms in a particular house, in which it is proposed to sell spirituous liquors, be in truth two distinct places, is a question of fact, and the judgment of the town council, under the evidence, holding that they are distinct places, will not be disturbed if the evidence justify, though it may not require, such a conclusion by the Council.

Retail license. Municipal corporations. Before Judge ANDREWS. Elbert Superior Court. March Term, 1873.

Sanders & Son petitioned the Superior Court of Elbert county for a *mandamus nisi* to be directed to the Town Council of Elberton, requiring said body to show cause why it did not issue to petitioners a license to retail spirituous liquors during the year 1873, at their house in said town, without confining them to one room in said building, upon their complying with its laws and ordinances.

The respondent answered substantially, as follows: The application of petitioners was for a license to retail spirituous liquors at two different places by two different persons, but all in the firm name of James A. Sanders & Son. They have heretofore been engaged in retailing as follows: James A. Sanders in the rooms fronting east, on the main street on public square, entered through a door in the east end. James O. Sanders, the other member of the firm, in the basement of the same building, fronting north, entered by two doors—one on the north, near the west end, and the other in the west end. There was no communication between the two rooms, except through the doors, as above stated. The rooms are separate and distinct from each other, each having all the arrangements for retailing, each of the parties attending to his respective department, and each keeping a book of his daily transactions. It was the intention of the petitioners to carry on business in this way under one license.

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The case was submitted to the Court upon the following agreed statement of facts: That the answer of respondent is true; that petitioners, after being refused a license to retail spirituous liquors in the two rooms above set forth, took a license which covered the upper room, and are now there transacting their business, but claiming the right to retail in both rooms; that the business, though proposed to be carried on in two rooms, was for the benefit of one firm; that no ordinance had been passed, or regulation established by the respondent, confining those who obtained licenses to one room; that petitioners had been restricted to one room.

The Court dismissed the petition, and petitioners excepted.

E. P. EDWARDS; H. A. ROEBUCK; J. D. MATHEWS; for plaintiffs in error.

ROBERT HESTER, by N. J. HAMMOND, for defendant.

MCCAY, Judge.

1. The authorities of Elberton are, by the act of incorporation, clothed with power to license and *regulate* the sale of spirituous liquors in said town: Act of 1859, page 153; Acts of 1865 and 1866, page 277. It seems to us that in the very nature of this power to regulate, is the power to confine the sale to certain houses, to certain places or localities, and to certain persons: 5 *Georgia*, 549; 10 *Ibid.* 533; 18 *Ibid.*, 603.

We see no reason why this power to regulate should not include the power to confine the sale to certain streets, certain houses, rooms in houses, or portions of a room. Any one may see that there may be special reasons, for police purposes, for the preservation of order, for the prevention of annoyance to quiet citizens, why, in particular instances, one or the other of these regulations might with great propriety be made.

The kind of regulation is left to the Council, and that power is exclusive in that body, nor will the Courts control

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its exercise, unless it be abused: 12 *Georgia*, 25; 19 *Ibid.*, 490; 23 *Ibid.*, 569.

We think, for these reasons, that there is nothing in this record showing any illegality in the action of the Council, confining the license to a particular room in the house of the applicants. They might exercise their power to regulate either by a general ordinance, or by specific regulations in each case, as the circumstances may in that case demand.

2. But independently of the right to regulate, and therefore to confine the sale to a particular room, it is not clear to us that in this case there is not an effort to get permission to set up two liquor shops under one license. These two rooms, under the admitted facts, are so situated as, in a very fair sense, to make two different places. They open on different streets, there is no communication inside between them, and they are on different stories; they are to be kept each by a distinct member of the firm, who will keep a separate account. We think it was no abuse of the exercise of the sound judgment of the Council to conclude that each was a distinct place; and that the fact of one firm being the owner of both, did not alter the case. How much further, when the business should be opened, this distinctiveness would go, is tolerably evident. Perhaps they are to be visited by different classes of people, sell at different prices, and different quantities of the same named liquor, opened at different hours and have entirely different manners, customs and practices. How far the admitted facts make these two rooms different places the Council has determined as a question of fact. We see nothing in the case to justify the conclusion that this decision is an abuse of power, and we, for both the reasons given, affirm the judgment refusing the *certiorari*.

Judgment affirmed.

JAMES T. THWEATT *et al.*, plaintiffs in error, vs. JAMES K. REDD, executor, *et al.*, defendants in error.

1. Where a testator, prior to the emancipation of the slaves, made his will, providing for the removal of his slaves to a free State, there to be manumitted, and bequeathing to them certain legacies, the fact that his negroes were emancipated by the results of the war, prior to the death of the testator, and not by the provisions of said will, did not prevent said legacies from vesting.
2. A legacy failing either by lapse or because void at law, falls into the residuum and passes to the residuary legatee, and not to the next of kin, where there is no contrary intention expressed in the will.
8. Where there was no ambiguity upon the face of the testator's will, parol evidence is inadmissible to raise a latent ambiguity and then to explain it.

Will. Emancipation. Legacy. Ambiguity. Evidence. Before Judge JAMES JOHNSON. Muscogee Superior Court. December Term, 1872.

For the facts of this case, see the decision.

HENRY L. BENNING; JAMES M. RUSSELL, for plaintiffs in error.

1st. The clear meaning of the will is that the negroes were not to take unless they remained the slaves of the testator until his death: 2 Ch. Rep., 162; 8 Viner Ab., 311; 2 Williams' Ex'rs, 833.

2d. But if there is any ambiguity, parol evidence was admissible to explain it: Irw. Code, secs. 2421, 3748; Doyal *et al.* vs. Smith, 28 Ga., 262.

3d. The sayings of the testator constitute good parol evidence: 1 Roper on Leg., 140; Trimmer *vs.* Bayne, 7 Ves., 508; Patterson *et al.* vs. Hickey, 32 Ga., 159.

4th. The legacies of all the legatees who died before the testator lapsed.

5th. The freed negroes were named, and the remainder of the money was to be "divided into as many parts as there are freed negroes in number, and part paid to each person over eighteen years of age, and the remaining parts divided among

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the parents of the children in the precise proportion the several families of children bear to each other." It is not that the shares of any of the freed negroes who might be dead were to go to the survivors: Irw. Code, sec. 2426.

6th. The particular legacies to Marino (\$2,500 00,) and to Howard, the executor, (\$1,500 00,) certainly lapsed: Code, sec. 2426.

M. H. BLANFORD; B. A. THORNTON; MOSES & DOWNING; INGRAM & CRAWFORD; JOSEPH F. POULSON, for defendants.

The Court below put its decision upon two principles.

1st. The Court committed no error in rejecting the testimony offered by the heirs-at-law, because said testimony was irrelevant, in no way tending to demonstrate or make clear the matters of fact in issue. If relevant, it would only tend to show a revocation of the will by testator: See this case in 43 Ga., 142.

2d. The 2d and 6th assignments of error embrace the same propositions, and we will consider them together, and may be stated thus: "That said will is void because the persons therein named as legatees are incapable of taking." For divers reasons stated in the bill of exceptions, we consider this question settled as *res adjudicata*: See Redd vs. Hargroves, 40 Ga., 18; 39 *Ib.*, 564; Greene vs. Anderson, 38 Ga., 655; New Code, sections 2432, 2420.

The 3d, 4th and 5th grounds of error also embrace the same proposition and may be considered together, and embrace the question: "Did any of the legacies contained in the will under the facts lapse so as to vest in or pass to the testator's heirs-at-law?"

1st. We say that the persons mentioned in said will as legatees took as a class, and a well settled principle of law is that the death of one of several legatees of a class does not lapse the legacy, but it goes over to the other legatees of such class: 30 Ga. 977; 1 *Rop. on Legacies*, 333; 1 *Jarman on Wills*, 304 marg. p. 296.

2d. Defendants in error contend that the persons mentioned

as legatees in testator's will are also residuary legatees, and that the 4th clause of the will clearly establishes this proposition, and this being true, if any legacy lapsed it fell into the residuum and passed by said 4th item of said will: 32 Ga., 624; 31 Ga., 489; 30 Ga., 976; 3 Vesey, 450; 15 *Ib.*, 416; 1 Vesey, Sr., 321; 8 Vesey, 25; 2 Roper on Legacies, 487, 498.

3d. In construing wills, the intention of the testator is to be looked to and if the same is not contrary to law, the same is to be carried out: *Greene vs. Anderson*, 38 Ga., 655; *Cook vs. Weaver*, 12 Ga., 47; Code, 2420; *Smith vs. Johnson*, 21 Ga., 386.

WARNER, Chief Justice.

On the 25th day of February, 1852, Owen Thomas, then, and at the time of his death, a citizen and resident of the county of Muscogee, made and executed his last will and testament, whereby by the third item of his will he devised and willed that: "My negroes, Griffin and his wife, Esther, and their children, Peggy, Elizabeth and Griffin, now born, and such as they may hereafter have; Mariah and her children, Sandy, Jacob, Willis and William, now born, and such as they may hereafter have; Jack and his wife, Hannah, and the children of Hannah, Toney, Ned, Wyatt and Malinda, and the children of Malinda, Homer, Nathan and Daphney, and such other children as she may have; Washington and his wife, Pleasant, and their children, if they shall have any; Marino and all her children, Eliza, James, Margaret, and such as they may hereafter have; Hudson, Armstead and Pearce, be conveyed to Liberia, or any other free State foreign to Georgia, unto which they severally elect to go, in which they may lawfully reside and there be forever manumitted and freed, they and their posterity." And by the fourth item of the will said testator directed as follows: "I desire that all the residue of my negroes, my lands, stock, crops and property of every kind be sold for cash, and the proceeds of sales, along with moneys on hand, collection of debts of every class

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due me, (excepting the debts of Thacker B. Howard specified,) be converted into a common fund to be disposed of as follows: So much as may be required, to the payment of debts, the defrayal of the expenses incidental to the execution of my will, the subsistence and removal to their new and contemplated homes of such of my negroes as are intended to be manumitted and freed, and the residue by eventual division among my negroes who shall thus become free." By the fifth item of his will, testator gave to each of his executors the sum of \$1,500 00 as fixed and full compensation for the execution of his will; to Griffin, the father, and Marino, each the sum of \$2,500 00 exclusive of, and additional to, what they receive in common with the other freed negroes; these several sums being abstracted and appropriated, he directed that the remainder be divided into as many parts as there are freed negroes in number, and one part paid to each person eighteen years of age, on his or her arrival in his or her new home, without regard to marriage or sex, including said Griffin and Marino, and the remaining parts divided among the parents of children in the precise proportion the several families of children bear to each other. The sixth item of the will gave to Mrs. Thacker Howard and her children a judgment of foreclosure of a mortgage in the Court of chancery in Russell county, Alabama. The seventh item appoints James K. Redd and Augustus Howard, executors. This will was duly proven and admitted to record in the Court of Ordinary of Muscogee county, and James K. Redd qualified as executor, and letters testamentary issued to him for the proper execution of said will. Augustus Howard, the other executor named in said will, died before Owen Thomas. Said Thomas departed this life on the 28th day of September, 1868.

The said Owen Thomas left as his heirs-at-law, Sophia W. Hargroves, of Macon county, Alabama, his sister, and the children of Mrs. M. W. Thweatt, deceased, to-wit: Jas. T. Thweatt, Robert R. Thweatt, Thacker H. Thweatt, and Julia M. Thweatt, child of Owen T. Thweatt, deceased.

The following legatees mentioned in said will, died before

Owen Thomas, the testator, viz: Elibabeth, Sandy, Willis, Marino, Jack, Hannah, Toney, Ned, Wyatt, Nathan. None of the legatees named in the will have had children born to them, except Malinda, who had one child, Mary, who is now in life and over eighteen years of age.

Upon the facts stated, said executor, Redd, filed his bill in Muscogee Superior Court against said heirs-at-law and surviving legatees mentioned, praying for directions as how to pay out the funds in his hands, arising from the sale of the property of the estate of said Thomas, deceased. On the trial of the cause, the heirs-at-law offered to prove by several witnesses the declarations of the testator, made a short time before his death, going to show his unfriendly feeling towards some of the legatees on account of their bad conduct towards him, their abandonment of him, etc., and his general denunciation of all of them, which evidence so offered was ruled out by the Court; whereupon, the heirs-at-law excepted. Thereupon, all parties to the bill admitted that the following facts were true: That the following legatees mentioned in the will: Elizabeth, Sandy, Willis, Marino, Jack, Hannah, Neal, Wyatt, Nathan and Tony, died before Owen Thomas, the testator. That Esther, Peggy, Griffin, Jr., James, Eliza, Margaret, Malinda, Homer, Daphney, Washington, Pleasant, Hudson, Ann, Armstead, Pearce, Griffin, Sr., Jacob, William, eighteen in number, survived testator. That each of the eighteen were over eighteen years old at the death of the testator. That the twenty-eight persons named as legatees and negroes in the will were slaves of said Thomas, deceased, when his will was made. That those who had not previously died, accepted emancipation from the government, over two years before the death of Thomas.

The counsel for the heirs-at-law asked the Court to charge the jury as follows:

1st. That if the legatees named in the will were emancipated before the death of Thomas, they could not take under the will; that the intention of the will was to give them leg-

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acies only in case they remained his (testator's) slaves up to the time of his death.

2d. That the legacies of all the legatees who had died before the testator had lapsed, and their shares went to the defendants, heirs-at-law.

3d. That the money directed to be used by the executors in transporting the legatees to some free country, also lapsed and went to the heirs-at-law.

4th. That the legacy given to executor, Howard, also lapsed and went to the heirs-at-law.

5th. That the special legacy given to Marino, who died before Thomas, lapsed and went to the heirs-at-law.

6th. That there were certain conditions contained in the will which had to be complied with before the legatees could take their legacies under the will, viz.: 1st. That the negroes should continue to be his slaves until the time of his (testator's) death. 2d. That they should be carried by his executors to some free State or country, foreign to Georgia. 3d. That the legacies were not to be paid to them until they arrived in their new homes, in some free State or country foreign to Georgia. 4th. That the testator intended to give the legacies only in case the emancipation was brought about by his will, and not by the government, and if said conditions had not been complied with, then the legacies failed, and the property went to the heirs-at-law.

The Court refused to charge as requested. The heirs-at-law excepted to the decision of the Court upon each and every point requested, and assign error thereon. And thereupon, the jury returned the following verdict, viz.: "We, the jury, find that the complainant be allowed the sum of \$1,500 00, as reasonable counsel fees. We further find that Griffin, Sr., died after the testator, and left Esther as his widow, and Peggy and Griffin, Jr., his children by his wife, Esther, as his heirs-at-law. We further find, of the negroes named as legatees in said will, in the third clause, to-wit: Elizabeth, Sandy, Willis, Marino, Jack, Hannah, Ned, Wyatt, Nathan and Toney died before the testator. We further find that, of the

legatees named in said third clause, the following survived him: Esther, Peggy, Griffin, Jr., James, Eliza, Margaret, Malinda, Homer, Daphne, Washington, Pleasant, Hudson, Armstead, Pearce, Griffin, Jr., William and Mariah, each over eighteen years old. We further find that Mariah had one child living at the death of testator, named Mary, sixteen years old at that time; that Daphne had one child at death of testator, named Sherman, about three years old; Hudson had one child at his death, about two years old, named Betsy; Pearce had two children at that time, one about six and the other four years old; Homer had one child at the death of testator, named Nett, about one year old; Eliza had one child four years old at testator's death, named Marino; William had one child named Sandy, at that time, about five years old."

And thereupon the Court decreed as follows: "This cause came on to be heard on the bill, answers of defendants, with exhibits and proof; the issues of fact were submitted to a jury who returned a verdict as hereinbefore stated. Whereupon, the premises considered, it is ordered and decreed that said complainant do retain out of said estate, as compensation for services as executor, the sum of \$1,500 00, and also the further sum of \$1,500 00 as a reasonable sum for the payment of expenses incurred in employing counsel to carry said will into execution. It is further ordered and decreed, it being made to appear that Griffin, Sr., survived the testator, but is now deceased, leaving Esther, his widow, and two children, Peggy and Griffin, Jr., his heirs-at-law; that said executor do pay to the said Esther, Peggy and Griffin, Jr., in equal parts, the said \$2,500 00, legacy bequeathed by said testator to the said Griffin, Sr. It being further made to appear that eighteen of the persons specified in the 3d clause of said will, and who were to take as residuary legatees, survived said testator, as specified and set out in the verdict aforesaid, and that some of them had children who survived said testator, as specified in the verdict aforesaid, in number eight, and under the age of eighteen years, at the death of testator, it is further ordered and decreed that the said complainant, after retaining said sums before

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allowed, and the payment of the said specified legacy of \$2,500, shall divide the balance or residue of said estate into twenty-six equal shares; and having so divided it, he shall pay one share thereof to each of the following: To Esther, Griffin, Jr., Peggy, James, Margaret, Malinda, Washington, Pleasant, Armstead and Jacob. To each of the following, two shares: To Mariah, Daphney, Hudson, Homer, Eliza and William, and to Pearce three shares thereof. And it is also ordered and decreed that the one share thereof that was to be given to Griffin, Sr., shall be paid, in addition, to Esther, Griffin, Jr., and Peggy, in equal parts, as the heirs-at-law of Griffin, Sr. And it is further ordered and decreed that said complainant do pay out of the funds of said estate, the costs of this cause, to be taxed by the clerk; that he do report, in writing, to this Court at its next term, and from term to term thereafter, until duly discharged by law, his actions and proceedings under this decree." And thereupon the heirs at law excepted to said decree and assign the same for error. -

1. This is the third time the will of the testator has been before this Court: See *Redd vs. Hargroves et al.*, 40 *Georgia Reports*, 18; 43 *Ibid.*, 142. This will has been established as the last will and testament of the testator, and we are now called on to construe the terms and provisions thereof in accordance with the rules of law applicable thereto. What is a will? A will is the legal expression of a man's wishes as to the disposition of his property after his death: Code 2359. The expressed wishes of the testator, as contained in his will, are, that certain specified negroes named therein (these slaves) should become free, and he provided for the accomplishment of that object, in the manner then allowed by law; and after giving certain specified legacies, mentioned in his will, desired that all his other property of every kind be sold for cash, and the proceeds thereof, with the money on hand, collection of debts of every class due him (except the debts of Thacker B. Howard) be converted into a common fund to be disposed of as follows: "So much as may be required for the payment of debts, the defrayal of the expenses incident to the execution

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of my will, the subsistence and removal to their new and contemplated homes of such of my negroes as are intended to be manumitted and freed, and the residue by eventual division among my negroes who shall thus become free." By the fifth item of his will, the testator gave to Griffin and Marino each the sum of \$2,500 00, exclusive of, and additional to, what they receive in common with the other freed negroes. These several sums being abstracted and appropriated, be directed that the remainder be divided into as many parts as there are freed negroes in number, and one part paid to each person eighteen years of age, on his or her arrival in his or her new home, without regard to marriage or sex, including Griffin and Marino, and the remaining parts divided among the parents of children in the precise proportion the several families of children bear to each other. It is contended for the plaintiffs in error that it is the clear meaning of the will that the negroes were not to take, unless they remained the slaves of the testator until his death. That the testator contemplated at the time of making his will that the negroes would remain his slaves at the time of his death, is quite apparent, and therefore he provided for their freedom in his will in the manner then allowed by law; but it is equally as apparent that the testator did intend that the legacy should be given to them when they were free—then they were to have it—that is to say, they were to have it by "eventual division among my negroes who shall *thus become free.*" The clear and manifest intention of the testator was, that the negroes should have the legacy when they became free and could enjoy the same as freemen; and the question is, whether the negroes, having become free and capable of receiving and enjoying the legacy *here* as freemen, without removal to a free State for that purpose, as contemplated by the testator when the will was made, they can now take it as such freemen *here*? This is not an open question in this Court, since the decision of *Green vs. Anderson*, 38 *Georgia Reports*, 655; See, also, the opinions of this Court, in relation to *Redd vs. Hargoves et al.*, 40

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Georgia Reports, 14, and *Hargroves vs. Redd* 43 *Georgia Reports*, 140.

2. Did the lapsed legacies go to the heirs-at-law of the testator or were the same disposed of by the testator in the 4th and 5th clauses of his will, to the legatees claiming the same? It is a general rule of the common law that lapsed legacies sink into the *residuum*, and unless disposed of by the testator, will go to his heirs-at-law, but if there be a residuary legatee under the will, when all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee named in the will. By the 2426th section of our Code, it is declared that if a legatee dies before the testator, or is dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their deceased ancestor. It is very clear, from the will of the testator in this case, that he did not intend to die *intestate* as to any portion of his property, for he desires that all his property (except the debt of Howard and the negroes to be set free) of every kind, shall be sold for cash, and converted into a common fund, to be disposed of as follows: First, to the payment of debts; second, the defrayal of the expenses incidental to the execution of his will, the subsistence and removal to their new and contemplated homes of such of his negroes as are intended to be manumitted and freed, and *the residue* by eventual division among his negroes who shall thus become free. That is the disposition which the testator by the 4th clause of his will makes of *all the residue* of his property, of every kind. By the 5th clause, he gives to each of his executors \$1,500 00 as compensation for executing his will, and gives to Griffin and Marino, each, the sum of \$2,500 00 exclusive of, and additional to, what they receive in common with the other negroes; these several sums being abstracted and appropriated, be directed that the remainder be divided into as many parts as there are freed negroes in number, and one part paid to each on their arrival in his or her new home, etc. All

the residue of his property was to be converted into a common fund, and the testator directs the disposition of that common fund in the 4th and 5th clauses of his will, and if the legacies of any one of the legatees lapsed by death, or otherwise, his or her share sunk into the residuum of that common fund, which was disposed of by the 4th and 5th clauses of the will according to the manifest intention of the testator. A legacy failing either by lapse or because void at law, falls into the *residuum* and passes to the residuary legatee, and not to the next of kin, where there is no contrary intention expressed in the will: *Word vs. Mitchell*, 32 *Georgia Reports*, 623. The residuary legatees who were living at the time of the testator's death and named in his will, and the issue of those named therein as residuary legatees who were dead, take under the will as provided therein, to the exclusion of his heirs-at-law. There are no words in this will which so narrow the title of the residuary legatees as to exclude them from taking the lapsed legacies, as in the case of *Hughes vs. Allen*, 31 *Georgia Reports*, 484.

3. There was no ambiguity on the face of the testator's will which would have authorized the admission of parol evidence to explain it, and the purpose of the evidence offered by the heirs-at-law on the trial, was to raise a latent ambiguity as to the intention of the testator in disposing of his property by parol evidence, and then to explain it by the same species of evidence. If that could be done in a case like the one now before us, no man's will can stand after his death. If the testator did not intend that his will should be operative and take effect according to the plain, unambiguous terms thereof, why did he not destroy it, or revoke it by making another? The testator may have made the declarations sought to be proved, but he did no *act* to defeat or destroy his will, and thereby prevent its operation as such after his death. Testators frequently talk about their wills; sometimes deny they have made one, especially wills like the one before us, because they did not care to incur the odium of public opinion, or to disappoint the hopes of expectant heirs, but nevertheless re-

tain their will up to the time of their death, which is much better evidence of their intention as to the disposition of their property than their parol declarations as to their intention, proved by witnesses after their death. If the clause in a testator's will as it stands may have effect, it shall be so construed, however well satisfied the Court may be of a different testamentary intention: Code, sec. 2420. Where there is no ambiguity on the face of a will, parol evidence is inadmissible to explain it: *Hill, et al. vs. Alford*, 46 *Georgia Reports*, 247. In view of the facts of this case, as disclosed in the record, we find no error in ruling out the parol evidence offered at the trial, or in refusing to charge the jury as requested, or in the decree rendered upon the verdict of the jury.

Let the judgment of the Court below be affirmed.

50 192
121 431

LARKIN SMITH, plaintiff in error, vs. HENRY G. KING *et al.*,
defendants in error.

1. A widow is not put to an election between a child's part and dower until there is administration on the estate of the husband. Nor does the statute of limitation run against her application for dower if she has remained in possession of the land until the application is made.
2. A bill showing a good case for equitable interference ought not to be dismissed on demurrer for want of a proper prayer, if there be a general prayer for relief.
3. When the title to land is in tenants in common, and their several interests have become complicated and cannot be definitely ascertained and set apart at law, equity will entertain jurisdiction to adjust by one decree the rights of all.

Dower. Election. Statute of limitations. Equity. Multiplicity of suits. Before Judge RICE. Gwinnett county. At Chambers. March 5th, 1873.

Larkin Smith filed his bill against Sarah King, *et al.*, making substantially the following case:

Complainant purchased from the defendant, Sarah King, the widow of Silas King, deceased, on October 14th, 1869, a

certain tract of land in the county of Gwinnett, for which he paid \$600 00, taking a deed to the same, approved by the Ordinary, said land having been previously set apart as a homestead to said defendant. Said defendant was in possession of said property at the time of the sale. She has since purchased, with the money paid to her by complainant, another tract of land, taking the title to herself, upon which she is now residing.

Since his purchase, complainant has expended large sums of money in making improvements upon said property. It being contiguous to the station known as "Buford" on the Atlanta and Richmond Air Line Railroad, complainant divided a portion of the land into town lots and sold them to various persons. The defendants, with the exception of said Sarah King, claiming to be heirs-at-law of said Silas King, deceased, have commenced an action of ejectment against Melvin Garner and others, who are in possession of said land as tenants of complainant. Complainant has been made a party defendant to said action. He has obtained from James O. Thacker and his wife, and from Jane M. King, claiming to be heirs-at-law of said Silas King, conveyances to whatever interest they might have in said property. T. S. Garner has now pending in Gwinnett Superior Court, on appeal from the Court of Ordinary, an application for letters of administration upon the estate of said Silas King, deceased, said estate never having been represented.

Complainant does not know who are the heirs-at-law of said Silas King; hence, it becomes important, both to him and to said heirs-at-law, that administration should be had on said estate, so that the rights of all parties may finally be adjudicated, by requiring such administrator to become a party plaintiff to said action of ejectment.

Prayer, that the action of ejectment be enjoined until a decree is had in this case; that the administrator, when appointed, be made a party plaintiff to said action of ejectment; that the defendant, Sarah King, be required to convey to the estate of Silas King the land purchased with the money paid

Smith vs. King et al.

to her by complainant; that said property may, by decree of the Court, be substituted in place of the land sold to complainant; that the heirs-at-law of Silas King, deceased, be perpetually enjoined from prosecuting said action of ejectment against complainant, his tenants, or purchasers from him; that complainant may have such other and further relief as the nature of his case may require, and as to the Court shall seem meet; that the writ of subpoena may issue.

On March 5th, 1873, on demurrer, said bill was dismissed, and complainant excepted.

N. L. HUTCHINS; JAMES P. SIMMONS, for plaintiffs in error.

J. N. GLENN; CLARK & PACE, for defendants.

MCCAY, Judge.

1. We are of opinion that Mrs. King had an interest in this land. She appears to have had possession since the death of her husband; to have lived on the place, the homestead. At any rate, there was no adverse possession. She is *entitled* to the possession until her dower is assigned: R. Code, sec. 1758. She is not bound to make her choice between dower and a child's part until one year after *administration*: Code, sec. 1754, par. 3; see, also, Act of 1841, Cobb's Digest, 230. As to her right of dower, we are inclined to the opinion that the Act of 1839 would not bar her, except as against purchasers, or others holding adversely. Certainly not when she is herself in possession. And even this Act of 1839 would not apply if her husband died before its passage: See 7 *Georgia*, 20. The bill does not show the date of the death, and we, therefore, cannot say whether she would be barred against even an adverse holder. Altogether, therefore, as to the widow, we do not think, as the case stands, that she is barred of her dower, nor even of her right to choose a child's part. We do not think the injunction ought to stand, so far as it enjoins the application for letters. That question has nothing to do with

the title to the land. It cannot be contended that the heirs are all barred of their title by the deed of Mrs. King, and it would be only, in that event, that their claim to the administration could be set aside. We see no reason why any issue arising on that application calls for equitable interference.

2. But we think there is equity in the bill. The complainant, by his deed, has whatever right *Mrs. King had to this land*, and we are inclined to think he can compel her, under the circumstances, to elect which of her two rights, dower or child's part, he thinks best for himself. Under the facts, as stated, those of the heirs who connived with Mrs. King and permitted her to sell to him the whole as hers, are estopped from setting up any interest in the land as against the complainant: 16 *Georgia*, 593; 31 *Ibid.*, 555; 30 *Ibid.*, 722; 13 *Ibid.*, 492; 29 *Ibid.*, 312. The bill also claims that the complainant has bought two shares. It also states that, in good faith, he has built upon the land, and that various lots have been laid off and sold by him, and that these have been improved. It is patent that this makes a very complicated case of rights in this land—one that, by no possibility, can be settled in one suit at law.

3. We think, therefore, the bill ought to be retained as a bill for partition, that the action of ejectment should be enjoined, and the questions between all the parties tried at once. It is to the public interest as well as to the interests of all the parties, that the matter should be settled by one judgment. Each of these purchasers from the complainant has an independent and special interest, and each must be sued alone at law: See R. Code, sec. 3283. The prayer of the bill, it is true, is not very precise in its requests, but there is a general prayer for relief, and we think the bill contains charges justifying its retainer for such relief as, under the law, its facts demand.

Judgment reversed.

Moses *vs.* The Brooklyn Life Insurance Company.

GEORGIANA MOSES, plaintiff in error, *vs.* THE BROOKLYN LIFE INSURANCE COMPANY, defendant in error.

Where insurance was effected in a mutual life insurance company on the life of the husband of complainant, for her benefit, upon the ten year plan, with the option to the assured that after two annual payments, should she wish to discontinue, the company will issue to her a paid up policy for as many tenths of the amount originally insured as there have been annual premiums paid in cash, and the premiums were paid part in cash and part in notes, with the stipulation that the dividends in the profits should be applied to the payment of the notes:

Held, That the assured was not entitled, after the payment of the second annual premium as aforesaid, to a paid up policy for two-tenths of the amount originally insured, until the liquidation in cash of the notes given in part of premiums, after crediting thereon the dividends already accrued.

Life insurance. Premiums. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

Complainant filed her bill against the defendant, in which she says:

On the 20th of June, 1868, the defendant made a policy of insurance on the life of her husband, Raphael J. Moses, for the benefit of her and her children by him. Defendant is a corporation of New York, authorized to make such insurance, and has an agency in Columbus, Georgia. By the policy, defendant, in consideration of \$648 75 then paid, and of the annual payment of the same sum on or before the 20th of June in each year for ten years, insured the life of said Raphael J. in the sum of \$15,000 00 for the term of his life, with participation in profits, to be paid in sixty days after notice of his death. It was stipulated therein that if the policy should cease or become void, she should be liable to pay the amount of all notes for premiums remaining unpaid, except the balance remaining unpaid on the note taken for part premiums, and made payable at twelve months from date, and this note was to be canceled on the surrender and cancellation of the policy. It was also stipulated that if, after two annual payments, she should wish to discontinue, the defendant would

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issue to her a paid up policy for as many one-tenths of the amount originally assured as there had been annual premiums paid in cash. On 20th of June, 1868, she paid defendant \$648 75, as stated in policy, of which sum \$432 40 was in cash, and \$212 25 in her note, due at twelve months, which was taken and considered by the defendant as cash. On 20th of June, 1869, the same thing was repeated. The defendant had the right to apply plaintiff's share of the profits to the satisfaction of said notes, and was willing to receive them as cash and rely for their payment on her share of the dividends, and did so receive them. On 5th of April, 1870, she gave notice to defendant that she, having completed two annual payments of premiums, desired to discontinue, and requested defendant to issue her a paid up policy for as many tenths of \$15,000 00 as she had paid annual premiums in cash; and she offered to surrender the said policy on the cancellation by defendant of said two notes, and the issuing to her of a paid up policy for \$3,000 00—*i. e.*, two-tenths of \$15,000 00. Defendant refused the request, insisting that it was not bound to comply with it until she had paid the two notes in cash, not even offering to allow her a credit on them for her share of the profits made by her stock. These amounted, in 1868 and 1869, to forty per cent., and in same proportion for the past part of 1870. She offers to deliver to defendant said policy, canceled, for a paid up policy of \$3,000 00.

Prayer, that defendant may make to her a paid up policy of \$3,000 00 and deliver to her said two notes, canceled, and may receive from her the present policy, canceled, and in default thereof, that defendant may pay her such damages as shall be equal to the value of such a paid up policy.

The answer of the defendant was substantially as follows:

Admits the making of the policy, but denies that it was made in Georgia, and says that it was made in New York. Had an agent in Columbus, Georgia, authorized to receive applications for insurance and forward them to defendant in New York, and to receive money and notes for premiums and to deliver policies, but not to make any contract of insurance

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or to change any made by defendant. To this agent the application for the policy was made, on one of the printed forms of the defendant, which was sent by the agent to New York, and there the president and secretary of the defendant made out and signed the policy and sent it to the agent in Columbus, who was authorized to deliver it to plaintiff on payment of the premium, and giving the notes due thereon according to the terms of the policy. When the policy was issued, defendant was in the practice of loaning one-third of the annual premium to the policy holder, if desired, which loan was permanent during the time the policy was in force. For this loan the party gave notes, payable at twelve months from dates, which were renewed annually, and increased by adding one-third of the premiums as they became due. The interest on such notes was payable in advance, in cash, so that no more than the principal would ever become due on them. In said printed applications are these questions: "4. How do you wish to pay the premiums? If all cash, state if annually, semi-annually or quarterly? If one-third note and two-thirds cash, state it so?" The mode was optional with the applicant. If the applicant desired to pay two-thirds cash and one-third note, and to pay the cash part quarterly, it was the practice of the defendant to take a "loan note" for the one-third due in twelve months, and to divide the two-thirds cash payments into four equal amounts—one-fourth payable on delivery of the policy, and the other three-fourths in three, six and nine months. The interest on the loan note and the last three quarterly payments was paid in advance. In this present application the plaintiff and her husband answered that they wanted to pay the premiums in one-third note and two-thirds cash, and the cash in quarterly payments, to which defendant agreed, and such is the contract in reference to said policy. The amount of premium was \$648 75, to be annually paid in advance for ten years. Accordingly, said Raphael J. gave his note for one-third of said amount at twelve months. The balance was divided into four parts, of which one was paid in cash, and the other in notes at three, six and nine

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months. Interest was paid in cash on all the notes. The three cash notes were all paid as they fell due until the next annual payment, at which time the said loan note was taken up and a new note given, including the one-third of the premium for the second year. The interest on this note was then paid in cash, and also one-fourth of the cash payment of the second year, and cash notes given for the other three-fourths at three, six and nine months, and interest paid on them. The following cash payments were made on said policy:

1868—Interest on loan.....	\$ 15 14	
Interest on cash notes.....	11 34	
Two-thirds payment in cash	432 50	
		\$458 98
1869—Interest on loan note.....	\$ 29 28	
Interest on cash notes.....	11 34	
Two thirds part in cash.....	432 50	
		473 12
Amount in cash for both years.....	\$932 10	

Of which \$865 50 is for two-thirds of the premiums, \$44 42 for interest on loan note, and \$22 68 for interest on cash notes. If the whole premiums for both years had been paid in cash, the amount would have been \$1,297 50; only two-thirds of this was paid in cash—\$865 50. The balance (\$432 50) is still due, and for which said Raphael J. gave his note, of which the following is a copy in substance:

“NEW YORK, June 20, 1869.

“Twelve months after date, for value received, I promise to pay to the (defendant) or order, \$432 50, being for part premiums due on policy 4436 on life of R. J. Moses, Jr., dated 186.., which policy, and all payments or profits that may become due thereon, are hereby pledged to (defendant) for the payment of the note.

(Signed)

“R. J. MOSES, JR.”

This note was in part payment of the premiums, but was not given or accepted as cash, but as a loan of so much of said premium; and it was agreed by plaintiff and defendant

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that if plaintiff should not pay the note at maturity the policy should become void. And further, was agreed that the profits to become due on said policy should be applied to the payment of the note. Defendant admits that this was not a temporary loan, to be paid in cash when due; but was permanent—to continue during the existence of the policy; but says plaintiff was bound to renew it annually and pay the interest in advance, adding to it every year one-third of the premium; but it was agreed that on the death of said Raphael J., the amount due on the note was to be deducted from the policy. Admits that by the terms of the policy the defendant, if it should become void, was to cancel the note on the surrender and the cancellation of the policy. This was, however, not because plaintiff was not bound to pay this note, but because defendant could afford to cancel the note, as the surrender value of the policy was equal to the note. Admits that plaintiff gave notice of a desire to discontinue and requested to have a paid up policy for two-tenths of \$15,000, and that defendant refused the request because two annual premiums had not been paid in cash. Denies that the loan note was equivalent to cash or was so understood to be by either party. Offered to give such a paid up policy on the payment in cash of the two annual premiums remaining due. Even offered to issue such a policy without the payment of said note in cash, and to allow it to remain as a loan and be a lien on such policy, as it was on the original policy, to be deducted from the paid up policy when this should become due.

The plaintiff refused these offers. Insists that the note is due and entitled to no credits for profits. According to the rules and practice of the company, no policy was entitled to a dividend of profits until after two full years, and none was divided until upon the payment of the third annual premium. If this policy had been running two full years before 1868, the percentage of profits to which it would have been entitled would have been thirty-four per cent.; and for 1869, thirty-one per cent.; and for 1870, nothing, no profits being made

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in 1870. The profits of 1869 and 1870 were not earned by policies issued in those years, but by those issued two full years before. The rules and practice of the company as to sharing profits are stated in the publications of defendant. Denies that defendant agreed to accept the note as cash, or to rely on the dividends for its payment, except that it agreed to apply any such dividends that might have become payable to the payment of said note.

The jury returned the following verdict: "We, the jury, decree that the Brooklyn Life Insurance Company shall issue to plaintiff a paid up policy of life insurance for \$3,000 00; the said company to hold the note of plaintiff for \$432 50 less the dividends, amounting to \$268 15, due from said company."

The evidence is unnecessary to an understanding of the decision, as the issues made are fully presented in the above synopsis of the pleadings.

The defendant moved for a new trial because the verdict was contrary to evidence, the charge of the Court and to law. The charge of the Court is not to be found in the record. The motion was sustained and complainant excepted.

HENRY L. BENNING, for plaintiff in error.

PEABODY & BRANNON, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant for the specific performance of a contract contained in a mutual life insurance policy. On the 20th of June, 1868, the defendant made a policy of insurance on the life of R. J. Moses, for the benefit of complainant and her children. By the policy, the defendant, in consideration of the sum of \$648 75 then paid, and of the annual payment of the same sum on or before the 20th of June, in each year, for ten years, assured the life of the said R. J. Moses, in the sum of \$15,000 00, for the term of his life, with participation in profits.

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to be paid in sixty days after notice of his death. The premium for insurance was paid part in cash and part by note. One of the conditions expressed in the policy is that, in case the said Georgiana Moses shall not pay, or cause to be paid, the premiums aforesaid on or before the day herein mentioned for the payment thereof, or any note, or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due, then the policy was to be void. It is also stipulated in the policy that the dividend of profits which may become payable by virtue of this policy to the holders thereof, shall be applied towards the payment of the note taken for part payment of premiums aforesaid. It is further stipulated in the policy, that after two annual payments, should the party wish to discontinue, notice to the company being given before the next premium becomes due, the company will issue a paid up policy for as many tenths of the amount originally assured, as there have been annual premiums paid in cash. The prayer of the bill is that the defendant may be decreed to make to complainant a paid up policy of \$3,000 00, and deliver to her the notes given to the company canceled, and receive from her the present policy canceled.

On the trial of the case, after considering the evidence, the jury returned the following verdict: "We, the jury, decree that the Brooklyn Life Insurance Company shall issue to the plaintiff a paid-up policy of life insurance for \$3,000 00, the said company to hold the note of plaintiff for \$432 50, less the dividends, amounting to \$268 15, due from said company." The defendant made a motion for a new trial on the ground that the verdict was contrary to the evidence, contrary to the charge of the Court, and contrary to law; and, also, on other grounds set forth in the motion therefor. The Court granted the motion for a new trial, whereupon the complainant excepted.

In our judgment the complainant was not entitled to a decree for the paid-up policy prayed for under the contract contained in the policy, until the note given for the premium

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had first been paid by the complainant, and the jury found by their verdict that there was still due the company on the premium note \$164 35. The payment by the complainant to the company of the two first annual premiums, was a condition precedent to be performed on her part by the terms of the contract, before she was entitled to have issued to her by the company a paid up policy of \$3,000 00. To enable the company to pay dividends from the profits, it is indispensably necessary that the assured should pay to the company the annual premiums stipulated to be paid, so as to create a fund from which profits may be derived. Each partner (if we consider the assured in the company as partners entitled to participate in the profits) should bear his or her proportion of the burden imposed on him or her by the contract, before he or she can receive the benefits which may accrue under it. Assuming that the Court charged the law correctly as applicable to the case before it (the charge of the Court not being in the record,) the verdict of the jury was contrary to law, and there was no error in granting the new trial.

Let the judgment of the Court below be affirmed.

JACKSON GRAHAM *et al.*, plaintiffs in error, *vs.* SINGLETON
G. HOWELL *et al.*, executors, defendants in error.

1. On the trial of a bill by a surviving partner against the representatives of a deceased partner for an account and settlement of the partnership affairs, the survivor is not a competent witness to testify in his own favor; nor does it alter the case that a portion of the matter in dispute is a Confederate transaction and involves the value of Confederate money, except that the survivor may testify as to the value of said money.
2. When the Judge on a trial charged the jury that, if a creditor agree to receive from his debtor a less sum in satisfaction of a greater, and the less sum is paid him, and he accepts it, the contract is executed and he cannot treat it as a nullity and sue for the balance, and the only evidence of a settlement was the testimony of a witness who swore that the debtor had left with him some money and papers to be given to the creditor, and that he had given them to him:

Held, That there was no evidence to justify the charge.

Graham et al. vs. Howell et al.

Witness. Partnership. Charge. Settlement. Before Judge RICE. Gwinnett Superior Court. March Term, 1873.

Jackson Graham and Clark Howell filed their bill against Singleton G. Howell and Samuel J. Winn, as executors upon the estate of Evan Howell, deceased, making substantially the following case:

Complainants, as owners of the land on which the western landing of "Warsaw Ferry," on the Chattahoochee river, is situated, were partners with Evan Howell, deceased, who owned the eastern landing, by virtue of a contract between Hampton W. Howell, from whom they purchased, and the said Evan. As such partners they were entitled to share equally in the profits of said ferry from January 1st, 1864, to December 30th, 1865, during which time said Evan received the entire proceeds, amounting to about \$20,000 00, in Confederate currency, and about \$2,000 00 in United States currency and gold and silver coin. The expense of maintaining and conducting said ferry, for the aforesaid period, was inconsiderable. Evan Howell, during his life, and the defendants, as his executors, since his death, have refused to account for and pay over to complainants their share of the aforesaid profits. Complainants disclaim discovery, and pray an account.

The defendants, by their answer, assert that, during the period aforesaid, the expense of maintaining and conducting said ferry was equal to the profits. They further allege that some time after the year 1865, their testator caused to be made a statement of the earnings of said ferry, showing the amount due to complainants, and deposited the same with the amount due, in the clerk's office of Gwinnett Superior Court, subject to the order of the complainants; that said amount was accepted and received by complainants, by which course they ratified said terms of settlement and are now estopped.

In the course of the trial, the complainants proposed to prove by Jackson Graham (complainant) the following facts: 1st. That he was a joint owner or partner of the ferry, its

franchise and its profits. 2d. His possession of the land on the west side of the river to which the ferry franchise was appurtenant. 3d. That a portion of the account sued for was in Confederate money; what contract existed between him and testator; the value of the Confederate currency. 4th. Under what contract he received the money or papers from M. L. Adair, the agent of Evan Howell, who was then in life.

The Court excluded said witness as incompetent, and complainants excepted.

M. L. Adair, a witness for the complainant, testified as follows: "Some time since the war, does not recollect when, perhaps a year or two after, old man Howell, or Singleton, left with him on deposit, to be paid to Mr. Graham, some money or some papers. Don't recollect the amount, if money. It was something about the ferry. Thinks he sent the money to Graham by his order. May have taken a receipt. If so, it was burnt up with the other papers in the Court-house. There were some papers deposited at the time the money was, but has no recollection of their contents."

The jury returned a verdict for the defendants. Whereupon, the complainants moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court erred in refusing to allow the complainant, Graham, to testify as to the above stated facts.

2d. Because the Court erred in charging the jury as follows: "If a creditor agree to receive from his debtor a less sum in satisfaction of a greater, and the less sum is paid him and he accepts it, the contract is executed, and he cannot treat it as a nullity and recover the balance;" which charge was not authorized by the facts of the case, and was calculated to mislead the jury.

The motion was overruled and complainants excepted.

J. N. GLENN; CLARK & PACE; N. L. HUTCHINS, for plaintiffs in error.

WINN & SIMMONS; J. P. SIMMONS, for defendants.

McCAY, Judge.

1. There was no error in the exclusion of Graham as a witness. The exception in the Act of 1866 is not that the other party, in the case of the death of one of the parties, shall not testify as to what occurred between the deceased and him, but he shall not "testify in his own favor." This excludes him as a witness. Had the question turned on the inquiry of the *value* of the *consideration* under the scaling ordinance, the exception might not apply. But, it is a mere excuse to say the complainant was hurt by his exclusion on this point. That was proven by the tables, and proven largely in his favor, as the tables give the specie value. If this were the only error, we should let the verdict stand; for even if he were admissible to show the value of the consideration (and it was in this case for that purpose, only, that he was not excluded under the Act of 1866) his exclusion would not have effected the finding. The tables show a lower value than he could show.

2. But we think it was error for the Court to charge, as he did, on the law of accord and satisfaction. There was nothing in the evidence of the clerk to show any such accord and satisfaction. There was no evidence of any *agreement*. What was the character of the papers, or the amount of money left with the witness, does not appear. Whether there was a statement of accounts, even, does not appear; much less, is there any evidence of there being a *proposition* to the plaintiff to take a certain sum and the receipt of that sum. The evidence of the witness, in its strongest light, is only that deceased left some money and papers with him, and that he transmitted them to complainants. To infer that this was an agreement and a settlement of accounts, is wholly gratuitous, and the charge of the Court, assuming, as it did, that there was *some evidence* to justify it, was an injury to the complainants. As there was error in this, it is not a sufficient support for the verdict to say that the evidence *justifies* it. That may be, and if there was no error in the Court we would not

Lamb vs. Allen.

interfere. But how can we say that the jury may not have found on the evidence of the clerk, under the charge? The rule is that if there be error in the charge, and the evidence does not *require—demand*—the verdict, a new trial will be granted.

Judgment reversed.

J. H. LAMB, administrator, plaintiff in error, vs. SARAH R. ALLEN, executrix, defendant in error.

If there be no newspaper published in the county in which land is levied on for sale, it becomes the duty of the sheriff to publish notice thereof in the nearest newspaper having the largest or a general circulation in such county. In the latter case, notice need not be published at any place in said county.

Levy and sale. Notice. Sheriff. Judicial sale. Before Judge HILL. Twiggs Superior Court. April Term, 1873.

For the facts of this case, see the decision.

H. C. WARD; J. D. JONES, by Z. D. HARRISON, for plaintiff in error.

JOHN T. GLOVER, by POE & HALL, for defendant.

WARNER, Chief Justice.

This was an affidavit of illegality made to an execution which had been levied on the defendant's land by the sheriff of Twiggs county, on the ground that the sheriff had published the notice of the sale of the land exclusively in the Macon Telegraph & Messenger, a public gazette published in the county of Bibb, and failed altogether to publish said notice of sale at any place in the county of Twiggs. The plaintiff in execution demurred to the affidavit of illegality, on the ground that the law did not require the sheriff to advertise his sales in the county of Twiggs, as claimed by defendant.

Sharp vs. Kennedy.

The Court sustained the demurrer and ordered the execution to proceed; whereupon, the defendant excepted.

By the 3599th section of the Code it is made the duty of sheriffs to publish notice of sales of land and other property weekly for four weeks, in some newspaper published in their counties, respectively; but if there be no such paper published in the county, then in the nearest newspaper having the largest or a general circulation in such county. The Code does not require that notice of the sale of the land should have been given in the county of Twiggs, other than the notice contained in the newspaper in which it was published. There was no error in sustaining the plaintiff's demurrer to the defendant's affidavit of illegality.

Let the judgment of the Court below be affirmed.

JAMES P. SHARP, plaintiff in error, *vs.* **WRIGHT KENNEDY**,
defendant in error.

1. Where there is a levy upon land entered by the sheriff upon an execution, but by mistake the entry is not signed by the sheriff, the failure to sign is not fatal to the levy. The sheriff may amend it by adding his signature.
2. An affidavit of illegality to an execution setting up facts as a reason why the execution is proceeding illegally, must distinctly present the matter relied upon, so that, if not denied, the Court may pass judgment intelligently, or if denied, that the jury may have distinctly before it the matter in issue.

Illegality. Amendment. Before Judge STROZER. Terrell Superior Court. May Term, 1873.

An execution issued in favor of Wright Kennedy against Leroy Brown, David Sharp, security, and Farnum & Sharp, returnable to the May term, 1873, of Terrell Superior Court, for \$800 00, principal, besides interest and cost. A levy was made upon certain property as belonging to James P. Sharp, a member of the firm of Farnum & Sharp, who, for himself,

Sharp vs. Kennedy.

for said firm, and as agent for David Sharp, presented an affidavit of illegality substantially as follows :

1st. That David Sharp and Farnum & Sharp were merely securities upon the note upon which the judgment in the said case was based ; that deponent, acting for them, had tendered to the plaintiff in execution the principal, interest and costs due upon said *fi. fa.*, and had demanded that said execution, together with a deed to some real estate held by the plaintiff as security, should be turned over to him, in order that those for whom he was acting might be subrogated to all the rights of the plaintiff as against the principal ; that the plaintiff refused to comply with this request, upon the ground that he was entitled to more interest than his judgment called for.

2d. That the memorandum to the note sued on, in relation to interest, was, as he is informed and believes, placed thereon after the same was signed by the securities and without their knowledge or consent, and by the direction of the plaintiff and their principal, and therefore has no binding effect upon the securities. (It is impossible to tell from the papers in the case what memorandum is referred to, as a copy of the note is not to be found in the bill of exceptions or record.)

The affidavit of illegality was demurred to. Pending the argument of the demurrer, the defendant moved to amend by adding an additional ground, as follows :

3d. That there has been no legal levy entered upon said execution in terms of the law.

Upon an inspection of the *fi. fa.*, in connection with this last ground, it was discovered that the levy had never been signed by the sheriff. Plaintiff examined the sheriff, who stated that he made the entry upon the *fi. fa.*, but inadvertently omitted to sign his name ; that he gave James P. Sharp verbal notice of having made said levy at the time, but did not give him notice in writing.

Upon this showing the Court allowed the sheriff to sign said levy, *nunc pro tunc*, and directed an order to that effect to be entered on the minutes. To this ruling the defendant excepted.

Sharp *vs.* Kennedy.

The Court then sustained the demurrer to said affidavit of illegality, and the defendant excepted.

Error is assigned upon each of the aforesaid grounds of exceptions.

LYON & IRVIN ; HOYLE & SIMMONS ; C. B. WOOTEN,
for plaintiff in error.

F. M. HARPER, by R. H. CLARK, for defendant.

MCCAY, Judge.

1. We see no error in this judgment. The entry of the sheriff was a perfect entry. The Code does not *require*, in terms, that it should be signed, though that is undoubtedly proper: Code (Irwin's) 3592. But the failure to sign is, as we think, amendable. The entry describing the property, and asserting the intention of the officer to seize the land, was complete. The signature is only the supplying of a clerical error. It might be different if there was no entry, (in case of land,) or if the entry was, in itself, wholly wanting in certainty: See *case of Wilson vs. Ansley, at this term.*

2. We think the affidavit was entirely too indefinite. It was not possible for the plaintiff to take issue on it. Admitting that the question intended to be made, can be made in this way—though this is by no means clear—still, it does not appear, by the affidavit, what it was that plaintiff refused to turn over. Nor does it appear that he was not justified in the refusal. It is stated, it is true, that he had a certain deed as collateral security, but it does not appear what deed. Nor would it be possible for a jury to find on the issue tendered one way or another, as to this deed, because there is not the least indication what the deed was. If parties propose to seek their equitable rights at law, they must set them forth at law as they would be required to do in equity.

As this affidavit is dismissed for want of certainty, the defendant loses no rights, except that he loses this *mode* of redress.

Judgment affirmed.

JAMES C. COOK, plaintiff in error, *vs.* NORTH AND SOUTH RAILROAD COMPANY, defendant in error.

1. Where a deed was executed by the complainant to the defendant, a railroad company, conveying to it the right of way through the complainant's land, without embracing any conditions or stipulations as to stock-gaps or bridges, a bill to enforce the erection of the same was properly dismissed.
2. There being no pretence that the writing signed by the parties, either by accident, fraud or mistake, did not embrace the whole terms of the contract, the sayings or declarations of the parties to vary or enlarge the terms of the written contract, were properly excluded.

Railroads. Right of way. Deed. Evidence. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

For the facts of this case, see the decision.

HENRY L. BENNING, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant to compel the defendant, by a decree of the Court, to make certain stock or cattle gaps on its road which run through the complainant's land where his fences joined the same, and also to build a bridge where defendant's road crossed the complainant's mill-road. The complainant alleges that the defendant promised to do these things before he executed to it a deed conveying the right of way through his land, for the consideration of \$3,500 00, paid by the defendant to the complainant, the said sum being the amount of damages assessed for the right of way through complainant's land by two arbitrators, selected by the parties for that purpose, and accepted by them. On the trial, the complainant offered to prove by a witness who drew the written agreement to submit the matters in dispute to arbitration, (which was signed by the parties,) what was their agreement and understanding in relation

Cook vs. The North and South Railroad Company.

to the defendant's making the stock-gaps and bridge. The complainant was also offered as a witness to prove a conversation with the defendant as to making the stock-gaps and bridge. This evidence was objected to by defendant, when the Court asked the complainant's counsel if he designed to attack said deed and submission for fraud, accident or mistake, and the reply was that he did not. The Court then rejected the evidence, and on motion of defendant, dismissed the bill; whereupon, the complainant excepted.

1. There is nothing in the written submission, or in the award which the parties accepted, or in the deed executed in pursuance thereof, which refers or relates to the making of stock-gaps or the bridge across the mill-road by the defendant. The contract between the parties, as it appears from the written evidence thereof, was that the defendant should pay to the complainant such damages for the right of way through his land as the two arbitrators might assess. The arbitrators not agreeing as to the amount, the parties themselves agreed that it should be \$3,500 00. The defendant paid the amount, and the complainant executed his deed to the defendant, conveying the right of way for the defendant's road, without any conditions or stipulations as to stock-gaps or bridge. Whatever may have been said between the parties anterior to the written agreement or contract, is presumed to have been merged in the written paper signed by them, which is the highest and best evidence as to what was the contract between them: Code, sec. 3709.

2. There is no pretence here that the writings signed by the parties, either by accident, fraud or mistake, do not embrace the whole terms of the contract, and, therefore, the parol sayings or declarations of the parties, to vary or enlarge the terms of the written contract, were properly ruled out. In the absence of any evidence of accident, fraud or mistake in the execution of the paper writings by the parties, there was no error in dismissing the complainant's bill.

Let the judgment of the Court below be affirmed.

RICHARD HOBBS, plaintiff in error, vs. WILLIAM L. DAVIS, defendant in error.

1. The lien of a landlord upon the property of his tenant for rent does not attach as against a purchaser from the tenant until the issue of a distress warrant, except upon the crop made upon the premises.
2. A purchase, *bona fide* made, by a creditor from his debtor, who is in failing circumstances is not fraudulent, simply because the consideration of the purchase is the debt due, and a promissory note, *bona fide* given at the time, for an overplus in the price agreed to be paid above the debt due.

Landlord's lien. Distress warrant. Purchaser. Debtor and creditor. Sales. Before D. H. POPE, Esq., Judge *pro hac vice*. Dougherty Superior Court. April Term, 1873.

Richard Hobbs rented a store-house in Albany, Georgia, to Joseph L. Raine, for the year ending October 1st, 1870. On August 1st, 1870, Hobbs sued out two distress warrants against said tenant, one for \$450 00, rent due, and the other for \$225 00, rent not yet due. Levies were made upon a stock of goods which was claimed by William L. Davis.

It is presumed that the two cases were tried together, though the record is silent upon this point.

The claimant relied upon a purchase made of said stock before said distress warrants were issued. Raine was indebted to him between \$1,500 00 and \$2,500 00. He canceled this debt, and paid him about \$250 00 surplus. Raine was insolvent at the time of the sale.

The jury returned a verdict for the claimant. Whereupon the plaintiff moved for a new trial upon the following grounds:

1st. Because said verdict is contrary to the following charge: "If said sale was made with intent to delay and defraud, and said intent was known to the purchasing creditor, it was void. A *bona fide* transaction upon a valuable consideration, and without notice, or grounds for reasonable suspicion, is valid."

2d. Because the Court erred in refusing to charge as follows: "The landlord, when he rents a store, had a lien on the goods in the store for his rent as against a purchaser of those goods, from the beginning of the contract."

Hobbs vs. Davis.

3d. Because the Court erred in charging as follows: "The landlord's lien begins only from the levy of the distress warrant."

The motion was overruled, and the plaintiff excepted.

HINES & HOBBS, for plaintiff in error.

WILLIAM E. SMITH; R. F. LYON, for defendant.

McCAY, Judge.

1. We do not think that, even at the common law, or under any English statute before we adopted the English law, the landlord had a lien on his tenant's property, as against a purchaser from him, during the term. But even if this were so, our law regulates their rights very differently. The lien of the landlord, except on the crop, does not commence until his distress warrant issues: R. Code, sec. 2260.

2. Without question, there are suspicious circumstances attending this transfer of the goods to Davis, and had the jury found the transaction fraudulent, we would not have interfered. But it is equally true that the affair *may* have been honest. If Davis tells the truth, (and the jury had a right to believe him,) it was an honest transaction. Nor is it illegal to do as Davis says he did. One has a right, under our law to buy, in good faith, of a debtor in insolvent circumstances, and pay in a debt due from the insolvent to the purchaser, if it be in truth a purchase; if it be not a mere scheme to get the effects away from the creditors; if there be no trust or reserve of any surplus to the debtor's benefit. That, in addition to the purchaser's debt, the purchaser gives something more, either in money or in his own note, does not alter the case. There must be some interest left to the debtor in the property; some reservation inconsistent with a true sale; some hiding or cloaking of the surplus, so as to cover it up for the benefit of the debtor or his family. Here, if Davis tells the truth, the sale was complete; the goods were delivered, the debt canceled, and a note given for the bal-

Rickerson vs. Flowers.

ance, a fixed sum, which Davis was bound to pay, notwithstanding future losses. It was as much a sale as though he had paid the money in full. Whether the intent was to defraud creditors, was for the jury. If they believed Davis, there was no such intent. Davis was as much a creditor as the plaintiffs, and the defendant had a right, under our law, to sell to him, and thus pay him in preference to others: Irwin's R. Code, 1943.

Judgment affirmed.

FRANK RICKERSON, plaintiff in error, vs. C. H. FLOWERS,
defendant in error.

Where a distress warrant was sued out for rent, and a counter-affidavit was filed denying that the defendant held the premises from the plaintiff, either by lease or rent, and also that he owed the plaintiff any rent, a verdict as follows: "We, the jury, find the issue for the plaintiff," was sufficiently certain, and covered the issue made by the pleadings.

Verdict. Distress warrant. Before Judge HILL. Bibb Superior Court. April Term, 1873.

For the facts of this case, see the decision.

E. H. HARMAN ; C. B. WOOTEN, by brief, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

This was a distress warrant for rent under the provisions of the 4005th section of the Code. The defendant filed a counter-affidavit denying that he held the premises from the plaintiff, either by lease or rent, and also denied that he owed the plaintiff any rent. On the trial of the issue thus formed, the jury returned the following verdict: "We, the jury, find

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the issue for the plaintiff." The defendant made a motion for a new trial on the ground that the verdict was void, as it did not cover the issue made by the pleadings, and because it was decidedly against the weight of the evidence, and without evidence or law to support it. The motion was overruled, and the defendant excepted. The distress warrant was taken out on the ground that the defendant had failed to pay the rent for the premises rented when the same became due. The issue made by the affidavit of the plaintiff and the counter-affidavit of defendant, was whether the defendant rented the premises from the plaintiff, and whether the rent claimed by him was due and defendant had failed to pay the same. The jury found that issue in favor of the plaintiff. Verdicts are to have a reasonable intendment, and are to have a reasonable construction, and are not to be avoided unless from necessity: Code, 3503. There was no error in refusing to set aside the verdict in this case, and there is sufficient evidence disclosed in the record to sustain it.

Let the judgment of the Court below be affirmed.

THOMAS LARENCE *et al.*, plaintiffs in error, *vs.* SALLIE A. EVANS, defendant in error.

Where a homestead was set apart under the Act of 1868 and was afterwards levied on to satisfy a *fi. fa.* founded on a debt contracted before 1868, the husband, or, on his failure, the wife, may apply for an exemption, under the law as it stood before the debt was contracted, and the exemption, if obtained before the sale under the levy, is a valid exemption against the judgment so levying.

Injunction. Homestead. Before Judge McCUTCHEN. Catoosa county. At Chambers. August 16th, 1873.

Sallie A. Evans filed her bill against Thomas Larence, W. H. Payne and James M. Edwards, sheriff of Catoosa county, making substantially the following case:

Complainant is the wife of C. L. Evans, and the mother of five minor children, and as such is entitled to a homestead of realty and personalty. The entire estate of her husband and his said family consists of the house and lot in the town of Ringgold, whereon they now reside, not exceeding \$500 00 in value; this property being in a village, would be allowed to her as exempt from levy and sale under section 2040 *et seq.*, of the new Code. On the day of, her said husband had said property set apart as a homestead under the provisions of the Act of 1868, but said judgment of the Ordinary has been rendered nugatory as against debts contracted prior to the adoption of the Constitution of 1868, by the recent decision of the Supreme Court of the United States. After he had availed himself of the supposed benefit of said Act, he contracted an indebtedness of about \$400 00 to one George W. Hill. Hill was proposing to move West, and desired to have security for said debt, and requested complainant to sign a deed conveying to him said house and lot to render him safe. This deed, though it may be absolute upon its face, was then and now is regarded and treated by the parties thereto as a mere security or mortgage, and was intended to operate only as such at the time complainant signed the same. At the time of the execution of said instrument, complainant is informed and believes that said Hill made and delivered to her said husband a bond for title, or some such instrument, obligating himself to reconvey said property upon the payment of said debt.

The defendant, Larence, holds two executions against complainant's husband, based on judgments obtained before the adoption of the Constitution of 1868, which have been recently levied upon the aforesaid house and lot. After the levy, and before the day of sale, complainant obtained from the Ordinary of Catoosa county an order setting apart said house and lot, and some personal property as exempt from levy and sale under section 2040 *et seq.*, of the new Code. Notwithstanding this order and with full notice of the same, the defendant, Edwards, sheriff, as aforesaid, sold said prop-

Larence et al. vs. Evans.

erty on the day advertised, at public sale, to the defendant Payne, at and for the sum of \$200 00, and executed to him a deed accordingly. Payne was and is the attorney for Larence, and complainant is unable to state whether said bid was made for himself or for his client. Said sheriff has threatened to eject complainant and her said family from the said house and lot unless she attorns to Payne.

Prays, that the defendants may be enjoined from ejecting complainant and her family from said house and lot; that the deed executed by the sheriff as aforesaid may be decreed to be delivered up to be canceled; that the writ of subpoena may issue.

The answers of the defendants set up the following facts:

The property in controversy having been set apart as a homestead to complainant's husband under the Act of 1868, she was not entitled to a second homestead in the same under the old law. The deed to Hill was in no particular conditional, it was absolute and conveyed the title to him. They deny that they had any notice of the exemption to complainant under the old law, before or at the time of the sale.

The Chancellor granted the injunction as prayed for, and defendants excepted.

W. H. PAYNE; E. F. HOGE, for plaintiffs in error.

A. T. HACKETT, by A. B. CULBERSON, for defendant.

MCCAY, Judge.

It is alleged in this bill, and the demurrer admits it to be true, that the property in dispute is not worth more than \$500 00. As it is situated in a town, it is not, therefore, of any greater value than was exempt from levy and sale at the time the debt, now seeking to condemn it, was contracted: Code of 1873, section 2040; Act of 1845, Cobb, 391. In my judgment, if this be so, it does not affect the question that it was laid off, under the Act of 1868. It is not over the law, but over its operation, that the jurisdiction of the Federal Court

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extends, and if, under the Act of 1868, one gets a homestead, no greater than he would have got, under the law, as it stood when the debt was contracted, there is no conflict between what the law has given him and the Constitution of the United States. But in this case, the party has taken an exemption under the Act of 1845, and in accordance with its provisions. It seems to us absurd to say, that, as he has acted under the Act of 1868, he cannot act under the law of 1845, if his act under the law of 1868 was void. If it was so void, then it is as though he had not acted at all. If the judgment of the Ordinary was void, the matter stands, as to this debt, exactly as if no such judgment was had.

We are, therefore, all of the opinion that this second application and the proceedings under it were legitimate and proper. That it was not recorded, ought not, in favor of these executions, to affect the question. They have lost nothing by the failure, since whatever rights they had were acquired before the application was made. What may be the rights of the person to whom the homestead was sold, is nothing to the plaintiff in execution. The complainant in the bill is in possession and she says that was no sale, but a mortgage, and by permitting her to keep possession the nominal grantee in that deed, *prima facie*, admits it. Altogether, we think there is enough in this case, as it stands, to justify and require an injunction, at least till a hearing can be had.

Judgment affirmed.

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JOSEPH A. SNELL, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

Where there was an indictment for larceny after trust delegated, under section 4858 of Irwin's Revised Code, and the indictment charged simply that the defendant had fraudulently converted the proceeds of certain sewing machines entrusted to him for sale on commission, to his own use, without any allegation of any demand for the money or any charge of a failure to pay:

Snell vs. The State of Georgia.

Held, That mere proof that the defendant had used a portion of the money for his own purposes, it not appearing that this was done with any fraudulent intent at the time, does not authorize the conviction of the defendant, nor are the allegations of the indictment sustained by proof of a subsequent failure to pay on demand, unless the circumstances of such failure authorize the conclusion that the original use was with fraudulent intent.

Criminal law. Larceny after trust. Demand. Before Judge HOPKINS. Clayton Superior Court. March Term, 1873.

Snell was placed on trial for the offense of larceny after trust. The material portion of the indictment against him was as follows:

“For that the said Joseph A. Snell, in the county aforesaid, on the day of February, 1873, with force and arms, being then and there employed as agent for the Singer Sewing Machine Company, incorporated under and by the laws of the State of New York, by virtue of his said office as agent as aforesaid, then and there, whilst he was so employed as aforesaid, was entrusted by said company with five Singer Sewing Machines, on the day and year aforesaid, for the purpose of selling said machines and paying over the money to said company, and he did sell five machines for \$275 00, and fraudulently converted said money, to-wit: \$275 00, to his own use.”

The defendant pleaded not guilty.

The evidence for the State made substantially the following case:

The defendant was employed as agent of the Singer Sewing Machine Company at the town of Jonesboro, in Clayton county, Georgia, for the purpose of selling sewing machines. Upon all sales he was entitled to receive twenty-five per cent. out of moneys collected. A number of machines were shipped to him, of which he admitted the sale of five. The price of five machines was \$400 00, and, consequently, had he collected this amount, he would have had the right to retain \$100 00. On January 4th, 1873, the proceeds of these five

machines was demanded from him by the company. He failed and refused to pay it over. He claimed that he had invested \$200 00 in a horse, which was to be used in the service of the company. He had no authority to purchase a horse. He had applied to the company for this authority, and it had been refused. He was authorized to invest the proceeds of any subsequent sales in a horse, the amount so used to be paid back out of his commissions as they accrued. The defendant claimed that he had been damaged to a considerable amount on account of the failure of the company to send him a wagon as soon as promised, causing him, by this failure, to lose valuable time. The wagon has been returned; the harness has not. Four of the five machines were disposed of by verbal sales, made on credit. This was contrary to instructions. The other was sold by written lease, in accordance with instructions—that is to say, it was considered as leased until fully paid for. On the sales made, he actually collected, in cash, \$197 00, on which amount he is entitled to retain twenty-five per cent. commissions. Payment was stopped by the company of \$205 00. The company appealed to the law for the purpose of obtaining the money due.

Much evidence was introduced by the defense to show the exact amount collected in money by the defendant, and also the good faith in which he acted. But as the decision of the Court turns upon the case presented by the prosecution, it is omitted.

The jury found the defendant guilty, but recommended him to the clemency of the Court. A motion was made for a new trial, because the verdict was contrary to the evidence and the law. The motion was overruled, and the defendant excepted.

BYINGTON & WATERSON; W. A. TIGNER, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

McCAY, Judge.

In the case of *McCoy vs. The State*, 15th Georgia, 205, this Court held, that, under section 36 of the Code of 1833, (of which section 4358 of Irwin's Code is but a transcript,) the crime of larceny after trust delegated was complete on a fraudulent conversion to the defendant's own use of the thing entrusted. This indictment is only good under that construction of the section. It fails to allege any demand, or even any failure to pay; it goes solely on the fraudulent conversion. We do not think the evidence sustains the indictment. The use of the money by the defendant, as proven, does not at all justify the belief that it was his intent to commit any fraud. He was a factor for a commission, and a rule that the use of the money received by a factor for goods sold by him on commission, is, *per se*, a fraudulent conversion, would be to make criminals of nearly all the factors in the State. It is the usual course of business for a factor to mix the proceeds of his sales with his own funds, and to use them indiscriminately, and if he account with the principal, no harm is done. To make out a case of larceny from the mere use of the article, it must appear that the use was fraudulent; that it was used under such circumstances as to show an intent to deprive the factor of his property. There is nothing in this evidence to justify such a conclusion as to this defendant. He had an interest in the proceeds to the full amount of \$100 00, and he had every reason to consider that his interest would increase by his future sales. Nor is there anything in the mode of the use to indicate that it was his intent at the time not to account fully with the principal. This failure to pay does not meet the charge. Had the indictment charged a disposition to the injury of the owner, and without his consent, and a failure to pay, the evidence would, perhaps, sustain it, unless, perhaps, the interference of the father, he being a minor, might excuse the failure. But this indictment goes on the fraudulent conversion solely, and, in order to make out the charge, that must be shown. We will not say this cannot, in any case, be made

Killen *vs.* The State of Georgia.

out by proof, of a demand and refusal. We can conceive of circumstances where a demand and refusal might show very clearly that the use was originally fraudulent. But there is nothing in this demand and refusal to show that. The failure to pay him is simply because the means are not at hand, or because of the interference of the father, and it is perfectly consistent with an original use, with full intent to account with the principal.

Judgment reversed.

JOHN KILLEN, plaintiff in error, *vs.* THE STATE OF GEORGIA,
defendant in error.

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The evidence as contained in the record, justifies the verdict of guilty, and this Court will not in such cases reverse the judgment of the Judge in refusing a new trial.

New trial. Before Judge PATE. Pulaski Superior Court.
April Term, 1873.

John Killen was placed on trial for the offense of murder, alleged to have been committed upon the person of one Jerry Mabin, on March 29th, 1873. The defendant pleaded not not guilty. The jury found to the contrary. Whereupon the defendant moved for a new trial upon the ground that the verdict was contrary to the evidence.

The testimony was as follows:

FOR THE STATE.

ISAAC WILLIAMS, sworn: Was about a half mile from Dykesboro, at John County's house, where the fuss happened between them. John Killen got up and got the gun; Jerry got up and got the hatchet. John walked out the door to the gate. Jerry said to him "Never mind, I will see you again." John walked back and took the corner of the house on him. Jerry came up and stood in the door, and at

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that time John shot—John Killen, the prisoner at the bar; he shot Jerry Mabin; he shot with a double barrel gun. Do not know what the gun was loaded with. Did not see the deceased after the shooting. The shooting took place on the 29th of March, 1873, in Pulaski county, in the State of Georgia. It was all done in ten or fifteen minutes. From the time of the commencement to the time of the shooting, witness could not have walked further than from here (the Court-house) over to the hotel, (one hundred and fifty-eight and one-half feet by measurement.) Was standing at the gate when he was shot. Saw hatchet in Jerry's hand while in the house; saw no hatchet afterwards; do not know if he had any hatchet in his hand at the time of the shooting. He stayed in the house; never did come out. It was at night. Jerry cursed John, but not much. Jerry called John a damned liar. After the damned lie was passed, both did not jump up immediately, one taking the gun and the other the hatchet. Jerry did not get the hatchet immediately. John got the gun and Jerry got the hatchet. Jerry sat down, and when John got the gun, Jerry got up and got the hatchet. I tried to keep them from fighting; they seemed anxious to fight. One other party tried to separate them. Did not let them get together and hurt each other at that time. John went out and Jerry went to the door. John, when Jerry told him "I will see you again," did not immediately shoot, but went sideways around to the corner of the house. From the gate to the door was about as far as I am from General Warren. Parties were friends, until Jerry gave John the damned lie. There was no light in the house. There was a candle in the house; after all went out except Perry and the deceased, Perry put the light out. Both seemed mad and excited. Jerry Mabin gave John Killen the damned lie repeatedly, and cursed him severely. Jerry Mabin did not live in the house; he lived one-quarter of a mile from the place where the killing took place. After the shooting, John Killen, the prisoner, came on down to the station at Dykesboro. Jerry was a much larger man than John. The gun was sitting in the

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direction pointed out by the witness to the Court and jury, from the parties, and John got up and walked around the deceased and got the gun. The hatchet was in the same corner where the gun was. I was not drunk. Don't think that John was drunk. Jerry had sense enough to play. Don't know whether they were excited by liquor. John had been drinking. Don't know whether the others had or not. Don't know the size of the hatchet. It was large enough to kill a man with—to split his head open.

JOHN COUNTY, sworn: The killing was done when I got there. I left them at my house, they promising to behave until I got back. I left to get provisions. When I got home the man was killed, in the house, and they were gone. By the door the chop axe was laying, pretty much where I left it, by a bag of bran, where I was feeding my chickens. Jerry, the deceased, was behind the door. He was about eight feet from the place where he was sitting when I left, in the relative position pointed out to the Court and jury. The bag was about four feet from the door, and the hatchet was lying against the bag. Hatchet and man were on the same side of the door, but the man was behind the door. I was at Mr. O'Berry's store when I heard the gun, about a quarter of a mile distant. I hurried home through the woods fast. No one there. When I got there, I made a fire and stayed with him. Jerry was shot; he was dead. This is all I know about it. Saw no wounds; did not examine the deceased. I stayed there until they carried me to the guard house on Sunday morning. I don't know who shot the deceased, or commenced or ended the difficulty. The hatchet I left within four feet of the door, but it was not in the corner of the house. Don't know whether the hatchet had been moved or not. The hatchet I called a chop axe, the blade was about six inches; a man could be killed with it. Jerry was much larger than John, being a tall man. He was a strong and healthy looking man. The gun was gone when I returned. The gun was loaded with bird shot. The gun was sitting up in the corner, in the right hand corner as you

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go in. Don't know whether the parties were drinking or not. Did not see them handling any liquor.

CHARLEY MULLIS, sworn: I saw the deceased in the house where he was killed, or where they said he was killed. From the wound he looked like he was shot with a gun and killed. I think he was wounded in the right breast, but as to the number of the holes, I am unable to state them, for I could not count them; sometimes there seemed to be four or five together. I did not try to count them. The wounds seemed to be made by small bird shot, that is from the appearance of the holes. They were sufficient to produce death. The party doing the shooting must have been very near.

FOR THE DEFENSE.

PERRY GRADY, sworn: I was present when the difficulty took place; the deceased said to Ike, what do you mean by holding the cards; says he could hold just as many cards as he could; the deceased said that it was a God damned rascally trick; said this to Ike. Deceased said to John that he had been drawing a gun on some of the boys, and God damn you, we will see you for it. Deceased at the time had the hatchet in his hand. John and Jerry were standing about as far apart as the distance shown to the jury. When John fired his gun the deceased had the hatchet in his hand; I was in the house when the parties got the gun and hatchet; don't know which got the gun or hatchet first; I was trying to keep them from fighting; don't know which started to get the gun or hatchet first; they were scrambling about there, and I told them not to have a fuss, as John County told them not to have a fuss; then this man, Jerry, said he would not have any fuss; don't know which jumped up first; they both jumped up and were scrambling about there; Jerry had the hatchet when I saw him. It was all done mighty quick; John Killen backed out of the house; Jerry was standing at the trunk when they were playing, but he walked and came to the door; he, Jerry, the deceased, said he would not have any fuss; John said that he did not aim to play with him any more.

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He told him to come and he would give John Killen fifty cents, and beat him out of seven ; then John shot him ; then he ran up towards the door like he was going to shoot him again. Jerry's reply that he would not have any fuss was in answer to the request of me not to have any fuss. The last conversation was to come back in the house and play cards ; John said that he was not going to play with him any more. John Killen went out backwards with a gun in his hands ; when John Killen went out Jerry was standing by the trunk. I did not tell counsel that Jerry was following John when he was backing out ; I did not tell counsel that both jumped up at the same time. I did not know that the gun was there ; I knew the hatchet was there. I could not tell which one got the weapons first. When they were running about John had nothing in his hands ; John got the gun ; I don't know where he got the gun ; he had it when I saw him. I don't know which got the hatchet or gun first. I told counsel that John backed out, but I did not tell counsel that Jerry was following him. We all went out in a hurry. The difficulty was going on about five minutes as near as I could guess ; from the commencement of the difficulty to the time the gun fired I don't know how far I could have walked. Parties seemed to me to be friends ; I don't know which was the bigger ; the deceased was higher than John Killen. When they jumped up and got to running around I don't know which got the gun or hatchet first ; when I first saw the gun it was after the scrambling ; I thought they were scrambling for the hatchet or adz ; I thought he was making for the hatchet or foot adz. He had to go right by Jerry to get the gun ; I run and got the light and blowed it out myself ; I then run out immediately ; I left Jerry in the house when I came out ; Jerry was standing at the trunk when I came out ; it was dark ; after I got out of the house John run towards the door and fired the gun ; the moon was shining and I could see ; when I ran out of the house Jerry had the hatchet in his hand ; I was badly scared ; after the gun fired the first time, John fired again ; at the second shot he hit Henry and me. I testified before in

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this affair, at Dykesboro ; I swore to the truth then. I thought that Jerry was talking to Ike when the misdeal was made, because Ike had the cards in his hands. John Killen and the deceased were the men that got up and were running round ; I thought they were after the hatchet or foot adz.

O. C. HORNE, sworn : Perry Grady stated to the counsel that when the prisoner was backing out of the house with the gun, deceased was following him with the hatchet ; that counsel could prove the same by him. Says that they were consulting with witness, Perry Grady, to see whether they should put him on the stand or not ; we were talking in a low tone or whisper, but very distinctly ; cannot say but what he might have misunderstood us, but we did not misunderstand him ; as a natural consequence, the chances of misunderstanding the witness, and he us, talking in the Court-house as we did, might have been greater than if we had been talking out of the house ; the conversation took place in the Court-house, but we were particular enough to repeat the questions often enough to understand him distinctly, as we thought.

W. L. GRICE, sworn : I understood him to say that both jumped up from the table together, and that when John walked out with the gun, Jerry was following him with the hatchet. Have been moderately zealous in the defense of this case. Conversation took place within the bar, and in a whisper ; he may have misunderstood our questions and assented to them unintentionally. It was my distinct understanding that his testimony would be as I have stated.

STATEMENT OF THE PRISONER, JOHN KILLEN : We were all sitting down playing cards, and there came up a misdeal ; Jerry said, what in the hell are you up to ; if that is what you are up to, holding cards, I can hold as many cards as any damned man. I said to him, gentlemen, there is no use in so much cursing about it ; any man was liable to make a misdeal ; and he said that it was a God damned lie ; that nobody would do it but a God damned rascal and a God damned son of a bitch. I then asked him what he said. He said it again—"you God damned son of a bitch,"—and then we both

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rose up and began to make for something to defend with. At that time we both got hold of the weapons, and Jerry was making at me with the hatchet, and struck at me with it; I kept backing from him until I got out of doors, he still pursuing me with the hatchet, and as I got out of the door, I shot; I did not know whether I hit him or not, and as I whirled to run, by having the other barrel cocked, it went off; I did not intend to shoot it.

The motion was overruled, and the defendant accepted.

WARREN & GRICE; O. C. HORNE, for plaintiff in error, submitted the following brief:

The killing was justifiable homicide: Irwin's Rev. Code, 836, section 4254; *Ibid.*, 836, 7, sections 4254, 5, 6; *Ibid.*, 838, section 4264; *Monroe vs. The State*, 5th Georgia Reports, 85, 132; *Ray vs. The State*, 15 *Ibid.*, 223, points 4, 5; *Stokes vs. The State*, 18 *Ibid.*, 17, point 1, 36; *Keener vs. The State*, 18 *Ibid.*, 194, point 10, 232; *Golden vs. The State*, 25 *Ibid.*, 527, points 4, 5, 532-3; Wharton's American Criminal Law, 987, 990, 992, 1020.

But if this was and is not a case of justifiable homicide, as we think and contend it *was*, then it cannot be a higher grade of homicide than manslaughter. The proof was, that the parties were friends up to the time of the difficulty; was provoked by the deceased without cause; that there was great excitement between the parties during the difficulty, and which got up instantaneously; the passions of the parties were greatly aroused, and during that time, and before the end of that state of things, and before there was time for passion to subside and reason to resume its throne, it being only from one to five minutes from the first to the last of the difficulty, and while deceased still had his said deadly weapon in his hand, when plaintiff in error fired his gun, that it was certainly a less grade of crime, if a crime at all, than murder. And in support of this view of the matter, without abandoning or yielding the first, we refer to the following authorities: Irwin's Code, 837, secs. 4258, 9; *Ray vs. The State*; *Stokes vs. The*

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State ; Keener vs. The State, already referred to ; and also Gann vs. The State, 30 Georgia Reports, 67 ; Alford vs. The State, 33 *Ibid.*, 303 ; Wharton's American Criminal Law, 933, sec. 932 ; *Ibid.*, 987, secs. 987-8 ; *Ibid.*, 988-9, 990.

No appearance for the State.

MCCAY, Judge.

As there is no exception taken in this case to the charge of the Court, we are driven to the assumption that it was such a charge as, under the evidence, was strictly in accord with the law applicable to the facts as proven. The only ground taken in the motion for new trial is, that the verdict is contrary to the evidence ; that, under the laws of this State, the facts do not authorize a conviction of murder. We will not repeat what we have so often said, that this Court has no authority to grant a new trial over the affirmance of a verdict by the presiding Judge, unless the evidence fails, altogether, to justify the verdict. It is to us most manifest that the evidence, as contained in this record, fully sustains the verdict. To call this killing a case of justifiable homicide, would, as we think, be a perversion of the law. The evidence is very strong that at the time of the killing the prisoner was in no danger. He had left the house. He was out of the reach of deceased's weapon, even if *he* (the deceased) was indicating any intention to use it. Having in his own hand a gun, he had the sure means of protecting himself should deceased advance upon him. Besides, if deceased was, at the time, coming at him, the prisoner had every opportunity to get out of the way. There is nothing in his conduct going to show that he (the prisoner) was declining "*further struggle*," as required by section 4267 of the Revised Code, in cases of this sort—that is, in cases of *self-defense* from danger to life during a quarrel, when both sides are not without blame. Nor can the verdict be fairly attacked on the ground that the evidence *demand*ed a verdict of only manslaughter. The jury had a right to believe from this evidence that there was

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plenty of time, after the hot words and mutual indications *in* the house of an intent to fight, for the passions to cool and reason to resume its sway ; that the deceased had declared his intent to have no fuss ; that he went to the door in a peaceful spirit ; that he spoke to the prisoner at the door in a spirit of reconciliation. They had a right, too, from the evidence, to believe that the prisoner, after he got to the gate, in front of the door, "took the corner of the house on the deceased," and that, himself protected, and partially hidden, he awaited the coming of deceased to the door, and shot in the spirit of assassination. They had a right, too, from the evidence, to believe that he was not satisfied with one shot, but that he shot a second time and rushed towards deceased after he had given the deadly wound. All this is in the evidence, and the jury may, as they had a right to do, have thought this the true version of the affair. If this be the true version, then, here was time to cool ; here was intent to kill ; here was the deliberate intent to take away life ; and, as the law says, this constitutes the so doing, murder.

It is painful to be the instrument of the law to impose its penalties upon the guilty. But the protection of society against murder is a high duty, and, though mercy may plead in moving terms, yet justice has imperative demands that may not be disobeyed.

Judgment affirmed.

CHARLES PATTERSON, plaintiff in error, vs. SARAH A.
LEMON, defendant in error.

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1. An administrator's sale is not void if he have proper and legal authority to sell. If he fail to comply with the law as to the mode of sale, the sale is voidable, except as to innocent purchasers.
2. Under sections 2518, 2519 and 2520 of Irwin's Revised Code, the place of sale of lands by an administrator may be either in the county having jurisdiction of the administration, or in the county where the land lies, according to the discretion of the Ordinary in each case ;

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and if land be sold in either county without such special direction, the sale is not void, but voidable only accordingly as the present owner of the land is or is not an innocent purchaser.

3. Where land lying in the county of Fulton was sold at administrator's sale, in said county, in the usual mode, and the deed to the purchaser recited the judgment of the Ordinary of Cobb county, authorizing a sale; that the sale was after due advertisement had, at public auction, on the first Tuesday of the month, between the usual hours, at the Court-house door of Fulton county, and the purchaser at the sale afterwards sold to another, who had no notice of any irregularity in the mode of sale:

Held, That if the order to sell in fact existed, the sale could not be avoided by the heirs-at-law as against such second purchaser, on the ground that the Ordinary had passed no special order directing the sale to be had in Fulton county, unless he had notice of the want of such special order.

Administrators. Sale. Purchaser. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Sarah A. Lemon and Caroline D. Oglesby brought ejectment, with a count for *mesne* profits, against Charles Patterson for a lot of land in the city of Atlanta. The defendant pleaded the general issue, and further that the plaintiffs cannot, in equity and good conscience, have and maintain this action, because of the following facts: The land in controversy was the property of William Lemon, deceased, who disposed of it by will, dated November 1st, 1863. This will was admitted to probate before the Ordinary of Cobb county on March 4th, 1867, and on the same day letters of administration with the will annexed were issued to Garnett S. Oglesby. On June 3d, 1867, at a regular term of the Court, said Ordinary passed the following order:

“GEORGIA—COBB COUNTY:

“It appearing to the Court that Garnett S. Oglesby, administrator *de bonis non* with the will annexed, on the estate of William Lemon, deceased, has made application for leave to sell the real estate of William Lemon, deceased, he having given the notice required by law, and it further appearing that it will be to the interest and advantage of the heirs and

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creditors of said deceased to have the estate of said deceased sold: It is, therefore, ordered by the Court that Garnett S. Oglesby, administrator *de bonis non* with the will annexed on the estate of said William Lemon, deceased, be, and he is hereby authorized and empowered to sell all the real estate belonging to the estate of said William Lemon, deceased, after advertising the sale thereof as required by law.

(Signed) "JOHN G. CAMPBELL, Ordinary.

"June 3d, 1867."

In pursuance of said order, said administrator, after due advertisement, did, on the first Tuesday in October, 1867, proceed to sell, at public outcry, to the highest bidder, at the Court-house door, in the city of Atlanta, county of Fulton, the real estate in controversy, and William Jennings and Edward P. Smith became the purchasers. Under said order of the Court of Ordinary, all of the lands of said estate of William Lemon, deceased, in the counties of Cobb and Fulton, were sold, and the returns of the sales made to said Ordinary, amounting in the aggregate to about \$3,900 00. The settlements of the administrator, as they appear of record, show that the plaintiff, Caroline D. Oglesby, received of this amount \$1,967 70, and the plaintiff, Sarah A. Lemon, received about \$1,900 00. The defendant submits that the plaintiff cannot, in equity and good conscience, take from this defendant, who is a purchaser from said Jennings and Smith in good faith, and for a fair price, the land, while they are at the same time retaining the proceeds of the sale thereof. Furthermore, defendant insists that, under the order of the Court of Ordinary aforesaid, all the real estate of said Lemon, deceased, was legally sold, and that the title thereto became vested in the purchasers thereunder, and that he is an innocent purchaser without notice of any irregularity or defect in said sale.

The evidence made the case presented by the aforesaid plea. The will of William Lemon devised said land to his daughter, Sarah A. Lemon, and to his widow, Caroline D. Lemon, who afterwards married Oglesby. Pending the suit said Caro-

line D. Oglesby died, and the action proceeded in the name of Sarah A. Lemon alone, for the recovery of her interest. It also appeared that the defendant had placed improvements to the amount of \$500 00 on the land in controversy; that he paid \$300 00 for the same; and that he purchased without notice of any defect or irregularity in the sale by the administrator or in the authority to sell.

The Court, amongst other things, charged the jury as follows: "Under the order of the Ordinary, produced in evidence, the administrator had a right to sell in accordance with the order; and it is presumed that the Ordinary had sufficient evidence before him to make the order. But under that order a legal sale could not be made by the administrator in the county of Fulton, and if a sale was made under that order in the county of Fulton, it was void, and conveyed no title to Jennings, nor could Jennings convey the title of the heirs to Patterson by making a title from himself to the defendant, Patterson."

The jury returned a verdict for the plaintiff for the undivided one-half of the premises in dispute.

The defendant moved for a new trial because of error in the aforesaid charge, and because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

COLLIER, MYNATT & COLLIER, for plaintiff in error.

Was the Court below right in charging the jury that the sale of the land in Fulton county, under the order passed in Cobb was void and passed no title to the purchaser, and the purchaser could pass none to Patterson? We think not. Appointment entitled the administrator to the possession of the entire estate, and may recover the same: Code, 2449 and 2450. To enable him to sell this property (real estate) he must have the order of the Ordinary: Code, 2518. This appointment then and this order are all that is necessary to enable him to pass the title. The innocent purchaser is bound only to see that the officer has competent authority to sell and

that he is apparently proceeding to sell under the prescribed forms: Code, 2586. What is competent authority to sell? Appointment and order to sell: Tucker vs. Harris, 13 Georgia Reports, 1. As to jurisdiction, see Code, section 366; Peterman vs. Watkins, 19 Georgia, 153; McDaniel vs. McDaniel, decisions, July Term, 1872, page 81. The record shows this to be a pending administration. Plaintiff cannot recover pending the possession of the administrator. The right is solely in him: Code, 2449; see, also, McDade vs. Burch, 7 Ga., 559. The judgment of a Court of competent jurisdiction cannot be collaterally attacked: Code, 3535, 3532, 3776; Doe vs. Roe, 30 Ga., 961. Plaintiff cannot have the land and retain the proceeds thereof: Judge Warner, in Groover vs. King, decisions, July, 1872, page 5; Southwestern Railroad Company vs. W. W. Chapman et al., July decisions, 1872, page 66.

LESTER & THOMSON, for defendant, cited Code, sections 2518, 2519; 4 Georgia Reports, 148; 8 *Ibid.*, 236.

MCCAY, Judge.

1. We recognize the well settled rule, that in order to divest the heirs-at-law of their title by an administrator's sale, the administrator must have authority to sell. This is a *sine qua non*. Without it the sale is void: 4 Wheaton's Reports, 77; Clements vs. Henderson, 4 Georgia, 148. Under our law, this authority is the judgment and order of the Ordinary having jurisdiction of the administration, duly had and rendered: McDade vs. Burch, 7 Georgia, 559. It is also true, that to make a perfect sale to divest the title regularly, the administrator must comply in full with the provisions of the law as to the mode of sale: Worthy vs. Johnson, 8 Georgia, 236; 10 *Ibid.*, 358. But whilst a sale without authority is void, a sale without a strict compliance with the requirements of the law, is only voidable. Even an innocent purchaser gets nothing under a void sale; but if the sale be voidable only, innocent purchasers, those having no notice, either actual or con-

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structive, of the irregularity, are protected. The heirs-at-law, in such a case, are driven for redress, if they have been hurt, upon the administrator and his securities. These are well-settled principles applicable to judicial sales: See Revised Code, section 2586. And, though in some of the States, administrators' sales are treated like tax collectors' sales, as sales under the authority of a Court of *limited* jurisdiction, and the recitals of the deed are required to be very full, even to give the deed *validity*, yet the distinction between the want of authority to sell, which makes the sale void, and a failure to conform strictly to the mode of sale, which makes it voidable only, is very uniformly adhered to: *McPherson vs. Cunliff* 11 Serg. & R., 422; 4 Dallas, 119; *Messenger vs. Kruter*, 4 Binney, 105; 6 Binney, 496; *Perkins vs. Fairfield*, 11 Mass., 227; *Watson vs. Watson*, 11 Conn., 77; 2 Vermont, 234; 4 Kent's Com., 344-5; *Worthy vs. Johnson*, 8 Georgia, 236; *Tucker vs. Harris*, 13 *Ibid.*, 1; *Brown vs. Redwine*, 16 *Ibid.*, 67. It may be remarked, too, that since the decisions referred to of our own Court, our law declares, in terms, that Courts of Ordinary are, in this State, Courts of general jurisdiction. If this statute is to have any meaning at all, it can only be to provide that persons claiming under such judgments shall stand in the same situation as those claiming under judgments of Courts of general jurisdiction. If this be the rule in Georgia, many of the decisions on the subject of administrators' deeds in other States, as to the strictness with which such sales are to be scanned, do not apply here.

2. Under the Act of 1816, and up until the adoption of the Code, the place of administrator's sale was *only* in the county where the land was situated. But, by the Code, section 2519, it is provided that the place of sale shall be in the county having jurisdiction of the administration, unless the Ordinary shall, by *special order*, direct the sale to be had in the county where the land lies. We confess that we doubt the propriety of this change in the law. The practice of the country for forty years, and common experience, indicate that the county where the land is situated is the proper county in

which to expose it to public sale. And the Act of 1863-4, providing that the notice of sale shall be in some newspaper having general circulation in that county, indicates the legislative opinion that it is there purchasers will most probably be found. But, we are satisfied from the words of section 2519, as well as from the context, that it was not the intent of the Codifiers to make this *special order* of the Ordinary a part of the authority to sell, without which the sale would be void. The authority to sell—the *sine qua non* of a valid sale—is provided for in section 2518 of the Code, (Irwin's.) Section 2519 is as follows: "Every such sale shall be advertised (in any newspaper having a general circulation in the county where the property is located: Act of 1863-4, p. 60,) for forty days after the leave granted, and before the sale. It shall be at public auction, on the first Tuesday of the month, between the usual hours of sale, and at the place of public sales in the county having jurisdiction of the administration, unless, by *special order* in the discretion of the Ordinary, a portion of the land is sold in another county where the land lies." It seems to us very clear that it was the intent of the Codifiers to place this duty to get a special order for the sale in the county where the land lies, among that class of acts by the administrator which pertain not to his *authority to sell* but to the *mode of sale*; that it stands upon the same footing as his duty to advertise forty days in a paper circulating in the county where the land lies, or to sell within the usual hours of sale, etc.; and that the failure strictly to comply makes the sale only voidable and not void. In such cases, the right of the heirs to have the sale set aside depends upon the innocence of the present holder of the lands.

3. We do not decide, at present, that it was not Jennings' and Smith's duty to inquire after this special order, though for myself I doubt it. The sale was in a county not *unusual* for such sales to be had; indeed, for forty years previously to 1863, such sales *must* have been in the place where the land was situated. But, in the case before us, a second sale has taken place. Patterson appears to have bought under the

 Van Epps vs. Jones.

recitals in the deed, to-wit: that the sale was in *pursuance* of an order of the Ordinary, and after due notice, etc. True, there is no specific recital of any special order, fixing Fulton county as the place of sales; but there is a general recital that the sale was in pursuance of the order of the Ordinary. We think, under this recital, Patterson had a right to presume a compliance with everything the law required, except the *authority to sell*. In this case, the authority to sell did, in fact, exist, as the record shows. The defect in the administrator's proceedings is *as to* the mode of sale; and as there is no proof of any notice to Patterson of this defect, we think the sale not voidable as to *him*, or as to others standing in the same relation, under the proof, as contained in the record.

Judgment reversed.

HOWARD VAN EPPS, plaintiff in error, vs. DARWIN G. JONES, defendant in error.

1. In a declaration claiming damages for words calculated to injure the plaintiff's reputation as an attorney at law, it is not sufficient to allege that the defendant was an attorney, it must be stated and proven that the words were used "in reference to his profession."
2. Where, in an action on the case for words, the ground of the action is "special damages flowing to the plaintiff from the use of the words," it is not sufficient to set forth as damages money paid voluntarily by the plaintiff, such as the charge of a notary for protesting a paper, which, under the law, was not a protestable paper, or which had not been legally protested.

Slander. Attorney. Damages. Before Judge HOPKINS.
Fulton Superior Court. April Term, 1873.

Van Epps brought an action for damages against Jones, making the following case:

On December 26th, 1871, defendant, being a Notary Public for the county of Fulton, received from the Georgia National

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Bank a draft, dated at Macon, Georgia, December 22d, 1871, drawn by Grier, Lake & Company, to the order of themselves, for the sum of \$95 22, on plaintiff, at sight, which draft the said drawers indorsed in blank and delivered for collection to one W. P. Goodall, cashier of a banking institution in said city of Macon, and said Goodall indorsed thereon, "Pay E. L. Jones, cashier, or order," and sent the same to the said E. L. Jones, who was the cashier of the said Georgia National Bank, whose business it was to collect such paper. The defendant having received said paper as aforesaid, did then and there, in usual form, protest the same for non-payment, and among other things, did declare in said protest, that he had exhibited the same to the plaintiff, and demanded payment thereof, which was refused. He then sent said protest with the draft to the source from which the latter came. The declaration made by the defendant was false and malicious, for plaintiff never had said draft exhibited to him, nor payment demanded from him, nor was he ever afforded even the opportunity of paying the same. The defendant returned said draft protested, and made said false recital in said protest, notwithstanding he well knew that the plaintiff was legally a practicing lawyer in said city of Atlanta, whose business and duty it was to collect all demands for money placed in his care for such purpose, and promptly to pay over the same.

Grier, Lake & Company, after having received back into their possession said draft and said accompanying protest, forwarded the same to another practicing lawyer for the assertion and vindication of their rights. Plaintiff was, for the first time, informed by said lawyer that Grier, Lake & Company had drawn on him for that amount, which he then and there promptly paid and remitted to them, together with all the costs and expenses to which they had been subjected by the bad faith as aforesaid of said defendant.

Immediately prior to the date of said draft, plaintiff had in his hands the sum of \$95 22, as net proceeds of collection for Grier, Lake & Company, and he had informed them of that fact, and that the money was subject to their order, and there-

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upon they drew on him as aforesaid. Upon being informed of said protest, Grier, Lake & Company withdrew their confidence from the plaintiff. If the assertion made by the defendant in said protest was true, the plaintiff was liable, under the laws of this State, to an indictment and conviction for felony, and to be stricken from the roll of attorneys, the consequence of which would deprive him of his liberty, degrade his character, destroy his profession and means of living, besides the special damage to which he has been subjected, and which he has paid, to-wit: the sum of \$100 00. By means of the premises defendant has damaged the plaintiff \$3,000 00.

The defendant demurred to the declaration. The demurrer was sustained, and plaintiff excepted.

CLARK & GOSS, for plaintiff in error.

J. M. CLARK & SON; A. W. HAMMOND & SON, for defendant.

McCAY, Judge.

1. Without doubt a Notary is liable for any damage caused by his failure properly to perform the duty he undertakes, and this action would not be demurrable if it alleged that any damage flowed from the failure of the Notary to present the draft. The damage alleged, the cost of protest, the plaintiff was not bound to pay. There is no allegation that the draft was protestable paper, payable at bank, and if not protestable paper, the plaintiff paid it when he was not liable to do so: 30 *Georgia*, 271; 29 *Ibid.*, 259. But this does not pretend to be an action for neglect of the Notary to *present* the draft, it claims damages because the draft was protested—because the defendant falsely *stated* in the protest that he had presented it to the plaintiff, and that payment was refused. It is essentially an action for injury to reputation, by slander or libel. It does not set forth words imputing a crime punishable by law, or with having a contagious disorder, or of be-

ing guilty of some debasing act which may exclude from society. Any such charge, under our Code, is actionable *per se*: Revised Code, section 2926. The only other charge actionable *per se*, under the Code, is "a charge made *in reference to one's trade*, office or profession, calculated to injure him therein." It is upon this that the declaration is claimed to be sustainable. The defect in the declaration is, that it does not charge that the words were used *in reference to the plaintiff's* profession. The statute is positive, that they must be so spoken or made. Nor is there anything in the declaration from which it can be fairly inferred that the charge was made in reference to plaintiff's profession. It is not enough that defendant knew he was a lawyer. Can it be contended that it is actionable to say of a lawyer that he will not pay his debts, much less a particular debt? I am not sure that it would be actionable to say of a lawyer, falsely, that he would not pay some particular money collected by him as a lawyer, or that it would be actionable to say of a blacksmith, untruly, that he had burned a certain horse in shoeing him. The authorities indicate that the charge must be of something that affects his character generally in his trade. A particular act may or may not do this, and the matter would depend on the *colloquium*. But the authorities are uniform that the words must be charged to have been used in reference to one's trade or profession. The speaker must have had the trade or profession of the plaintiff in view, and utter the words in reference to it, as if he should say of a grocery merchant, he keeps false weights, or of a lawyer, that he won't pay his *clients* the money he collects for them: Starkie on Slander, 109, 126. It would be entirely a new ground of action to hold that it was actionable to utter of a lawyer that he refused to pay a particular debt, there being nothing in the words or in the *colloquium* to indicate that the speaker was alluding to him *as a lawyer*. Such a rule would put lawyers on a vantage ground that the law has not put them on: See Starkie on Slander, 109, 126.

2. We affirm the judgment, because it is not charged that

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the words were used with reference to the plaintiff's profession ; and on the further ground, that as this allegation is not made, and the case must stand as though plaintiff were not a lawyer ; there is no allegation of any special damage flowing naturally from defendant's words.

Judgment affirmed.

HENRY SULTER, plaintiff in error, vs. ELIZABETH B. MUSTIN, defendant in error.

When a married woman ordered from the milliner a hat at the price of \$12 50, informing the milliner that it was intended as a present to a friend, but when the hat was finished she refused to take it, and suit was brought against her husband for the price of the hat ; and on the trial it appeared that the wife was fully supplied with hats, that she was in the habit of paying her own bills, and that he had no knowledge of the transaction ;

Held, That the husband was not liable for the price of the hat.

Husband and wife. Necessaries. Before Judge SCHLEY. Chatham Superior Court. May Term, 1873.

Henry Sulter petitioned for the writ of *certiorari*, making the following case:

Elizabeth B. Mustin brought suit against petitioner for \$12 50, it being the price of a hat alleged to have been ordered from Mrs. Mustin by petitioner's wife. The case was heard on January 9th, 1873, before Levi S. Hart, Esq., a Notary Public and *ex officio* Justice of the Peace, for the third district. Petitioner pleaded the general issue.

Mrs. Mustin testified that Mrs. Sulter ordered a hat from her, for which she (Mrs. Sulter) selected the materials. After the hat was completed, Mrs. Sulter ordered some changes, which were duly made. It was then sent to her, but she returned it, saying she had found one which suited her better. It was understood that the hat was to be made up in workmanlike style. Witness' business is that of a milliner. She now has

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the hat subject to Mrs. Sulter's order. Mrs. Sulter had on a good hat when she ordered the one for which suit is brought. Witness did not ask her, nor did she care to know, whether she needed the hat for herself or family, but she gave witness to understand, at the time she ordered the hat, that she intended it as a Christmas present for a friend.

The plaintiff here closed.

Petitioner moved for a non-suit. The motion was overruled, and he excepted.

Mrs. Sulter testified that after the hat was finished she refused to take it, because it was not done in a workmanlike style, it being a "botch." That the sewing was bad, the velvet was unskillfully put on, and the hat, altogether, presented such an unseemly appearance that not only would witness not wear it herself, but she would not ask any one else to do so. That she, though no milliner, has fixed up a hat better than that. That plaintiff did offer to make the alterations witness desired, but would not do so without charging extra. That witness would not pay any extra charges because \$12 50 is a high price for a hat, and it was not customary, when such an expensive hat was ordered, to pay anything extra for alterations.

Petitioner testified as follows : Did not authorize his wife to make any contract with plaintiff, or any one else, for a hat ; in fact knew nothing about the matter until one hour before he was sued. Mrs. Sulter has several hats equally as good, if not better, than the one spoken of. She did not then, and does not now, need a hat, having been all the time well supplied. She always pays her own bills. He was surprised when the bill was presented to him. He refused, and still refuses, to pay for the hat, as he never authorized it to be bought or contracted for.

Mrs. Mustin, in reply, testified that the hat was done up by a good milliner, with whose work nobody had ever found any fault.

The Justice rendered a judgment against petitioner, to which he excepted.

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He now assigns error upon the two aforesaid grounds of exception, and prays the writ of *certiorari*. The petition was sanctioned and the writ issued. Upon the final hearing, which was had upon the facts as above detailed, a new trial was refused, and the judgment of the Justice affirmed. To this ruling petitioner excepted.

T. R. MILLS ; R. R. RICHARDS, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

However it may be that the plea set up by the defendant is an unusual one at this day, yet it is none the less the law of this State, that the husband is only liable for *necessaries* bought by or furnished to the wife. And this is true, whether the liability turn on the presumed agency of the wife to purchase necessaries in his name, whilst they are living together, or upon his obligation to support her in case they be separated. In both cases it is only for necessaries that the husband is liable. As a matter of course, it is not required to constitute necessaries that they should be such in the absolute sense of the word. Such things are necessaries, in the legal sense, as are usual and proper for the use of a family in the circumstances of the parties. Whilst we are not prepared to say that there is no case in which an article intended as a present to a friend may not come within the rule, yet it is obviously a perversion of the meaning of words to class a present of a \$12 50 hat as an act of necessity. Social duties unquestionably create wants and necessities as well as do other relations of life, but a present of an article of the character described can hardly be conceived of as a *duty*, either of charity or friendship. But in this case the article was not, in fact, received and used. It has not gone to the use of the husband in any sense. If he is liable for it at all, it is in the breach of the contract to take it. The foundation of his liability in all cases is, that he has got the benefit of the property of an-

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other, and the law implies a promise to pay, if it was a proper thing for the use of his family. We know of no case where the liability has arisen from the mere *contract*. The husband is liable for necessities *furnished* on the order of his wife, on the principle we have stated, but not on the contract when they have not been received, unless she be shown to be his agent. The case would then stand on the extent of the authority as agent.

Judgment reversed.

CHARLES G. PLATEN, plaintiff in error, *vs.* LEVY E. BYCK,
defendant in error.

Where A had a suit pending against B, and had also a summons of garnishment sued out against C, a debtor of B's, and before A's claim against B was carried to judgment, it was agreed, in writing, by the attorneys of the three parties, that the garnishment should be dissolved; that C should pay the amount he owed B over to B's attorney, who, after taking out his fees, should hold the balance subject to A's suit against B, and C paid the money according to the agreement and in good faith:

Held, That the garnishment was dissolved by the payment of the money under the agreement. If the money is not duly held and disposed of under the agreement, A has his remedy by rule, against the attorney receiving the money, but the garnishee who has in good faith paid his money, is discharged.

Garnishment. Attorney and client. Rule against officer. Before Judge SCHLEY. Chatham Superior Court. May Term, 1872.

The facts of this case are succinctly as follows: On January 18th, 1871, Platen recovered a judgment against one Adam Short for \$1,421 29, in Chatham Superior Court. Summons of garnishment had been previously served upon Byck. At the February term, 1870, of the City Court of Savannah, Short recovered a judgment against Byck for \$700 00 and costs. Subsequent to this last mentioned judgment, but prior to the first, the following agreement was entered into:

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“ ADAM SHORT *vs.* LEVY E. BYCK.

“ *In the City Court of Savannah, February Term, 1870.*

“The said case having come on for jury trial at the February term, 1870, and judgment having been given for plaintiff in the sum of \$700 00 and costs ; and it further appearing that there is now pending in the Superior Court of Chatham county, a suit wherein the said Charles G. Platen is plaintiff, and Adam Short defendant, and that said Levy E. Byck has been served with process of garnishment, to answer at the Superior Court what he is or may be indebted to said Adam Short, sued out by the said Platen. Now, it is mutually agreed that the said garnishment shall be as if regularly dissolved, and that the said amount of \$700 00 may be paid over to the attorneys of Adam Short, to be by them held to answer the determination of the case in the Superior Court, after deducting the amount of their fees, due to them from said Short.

“ Savannah, 28th February, 1870.

(Signed)

“ WM. D. HARDEN,

“ Attorney for C. G. Platen.

“ JULIAN HARTRIDGE,

“ HARTRIDGE & CHISHOLM,

“ MILLS & TOMPKINS,

“ Attorneys for A. Short.”

Byck paid over the money to Short's attorneys on the day the above agreement was signed.

On the 13th of May, 1872, judgment was rendered in the Superior Court of Chatham county against Byck, as garnishee, for the full amount of the judgment rendered in favor of Platen against Short, said Byck having failed to answer. On June 3d, 1872, the following order was taken :

“ CHARLES G. PLATEN *vs.* ADAM SHORT, defendant, and LEVY E. BYCK, garnishee.

“ *Judgment Rendered against garnishee, May 18th, 1872.*

“ It now appearing that the summons of garnishment on the above judgment mentioned, had, for a valid consideration,

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been withdrawn by plaintiff's counsel, and that no answer was required thereto on the part of the said garnishee: It is hereby ordered, that the said judgment against Levy E. Byck, the said garnishee, be set aside and vacated, and that the sheriff dismiss his levy made in that behalf, and return the execution to the clerk of this Court, with the proper indorsement, at plaintiff's cost.

"In open Court, June 3d, 1872.

(Signed)

"WILLIAM SCHLEY,

"Judge Superior Court, Eastern Circuit."

On July 10th, 1872, Platen petitioned the Court for a rule against Byck, requiring him to show cause why said order of June 3d, 1872, should not be vacated, on the ground that it was granted without notice to petitioner. The rule issued as prayed for. Upon the hearing, substantially the above facts were made to appear, and the Court refused to vacate the order as prayed. To this judgment exception was taken by Platen.

CHARLES G. PLATEN, in *propria persona*, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

If the judgment against the garnishee was, in fact, improperly taken, there was no error in the refusal of the Court to set aside the order vacating it. It would be mere child's play to re-establish the judgment on the ground that it was vacated without notice, and then vacate it because it was in truth illegally taken. As the judgment against the garnishee was in the nature of a judgment by default, for his failure to answer, it follows that if he had, from the plaintiff's conduct, a right to believe it was no longer to be pressed against him, he was not in default. We think the facts show he had the best of reasons. He had the written agreement of the plaintiff's attorney that if he would pay the full amount of his

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debt to Short, as ascertained by Short's judgment against him, over to Short's attorney, to be by him held to await the plaintiff's judgment against Short, the garnishment should be dissolved. In good faith, and in pursuance and upon the authority of this agreement, the garnishee paid the money.

Had he a right to act upon this agreement of the plaintiff's attorney? Had he a right to assume, after he had complied with his undertaking, to suppose the garnishment would be abandoned? and was he, therefore, not in default? We think he was not in default, that he had a right to treat this agreement of Mr. Harden as the agreement of the plaintiff, and having in good faith acted on it, he is discharged and the garnishment dissolved. Mr. Harden was the plaintiff's agent. Under section 443 of the Code, (1868,) an attorney at law has a right to bind his client by such an agreement. The words are, "they have authority to bind their clients in any action or proceeding by any agreement in *relation to the cause*, made in writing, and in signing judgments and entering appeals." This is a very broad authority, and, in our judgment, includes this case, to-wit: an agreement that the garnishee shall deposit the amount due to await the event of the suit brought by the attorney. But independently of this, the Judge was justified under the evidence in coming to the conclusion that the plaintiff was consulted about the matter, and that the agreement was with his concurrence, and with his approbation after it was done. True, the plaintiff himself says not, but Mr. Harden so testifies, and it was for the Judge to believe Mr. Harden if he thought his testimony the most reliable.

¶ We think it would be a gross wrong on the garnishee to compel him to pay this money again after he has paid it under the orders of the plaintiff's attorney. That the plaintiff has not got his money is not Byck's fault. Whether the person into whose hands it was paid has properly kept it or disbursed it, is not now the question. If he has not, the plaintiff has his remedy. He, the attorney, is an officer of Court, and it would be a violation of his duty, as an attorney, not to

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have the money as the agreement provides. It is no answer to say that Mr. Harden acted unwisely, or even corruptly in making this agreement, unless Byck was a party to or had knowledge of the corruption. Mr. Harden was the plaintiff's chosen agent, and he must abide by his agent's acts within the scope of his authority. We do not say Mr. Harden acted improperly. Indeed, so far as the record shows the facts, the agreement seems to have been a very proper one to have been made, and at the time, apparently very much to the plaintiff's interest.

Upon the whole, we affirm the judgment, leaving open to the plaintiff to compel the attorney who received the money to be called on by the Court to account as an attorney at law for this money, received by him as such, in trust to answer the plaintiff's judgment. As it appears to us, he has charged a very heavy fee, and if the plaintiff pleases he can call him to account for the use of the trust he undertook.

Judgment affirmed.

THOMAS CRAWFORD, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial in a criminal case when there have been two verdicts of guilty, and the case turns wholly on the credibility of the witnesses.
2. When a motion was made in the Superior Court for a new trial, which was refused by the Court and a bill of exception to his judgment was tendered, signed, served and filed in the clerk's office, and after this, during the same term, a motion was made to rehear and set aside the judgment refusing the new trial, on the ground that the movant had discovered new and important evidence which ought to control the verdict, and the Judge failed to pass upon this latter motion, *pro or con*, but by an order directed the clerk to send it with the other papers to this Court under the bill of exceptions :

Held, That, as the Judge has not passed upon this latter motion, it is still pending in the Superior Court, and cannot be considered here until it be passed upon by the Court below.

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Crawford vs. The State of Georgia.

New trial. Bill of exceptions. Judgment. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Thomas Crawford was placed upon trial for the offense of burglary in the night time, and convicted. He moved for a new trial because the verdict was contrary to evidence and to law. The motion was overruled, and he filed his bill of exceptions. Subsequent to this he presented to the Superior Court a petition for a rehearing of the motion for a new trial, upon the ground of evidence newly discovered since the order was passed overruling said motion. The petition was supported by the affidavits of the witnesses. The Court directed that the affidavits embracing the newly discovered evidence be made a part of the record in the case, and transmitted to the Supreme Court.

It appeared from the record that the defendant had been convicted at a previous term of the Court, and a new trial had been awarded him. The evidence upon the second trial, being voluminous, is omitted as unnecessary to an understanding of the opinion.

Error is assigned upon the refusal of a new trial.

THRASHER & THRASHER, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

McCAY, Judge.

1. It cannot be denied that the verdict in this case is not supported by evidence of much weight. True, the witness does testify that he did, in fact, on the night in question, recognize the prisoner as the person he found under the bed, and who assaulted and beat him, and in all probability stole the missing articles. But his statements made that very night to the policeman, and to the other persons to whom he told the story, as well as his statements made next day to Lynch, and his extraordinary neglect to inform the police that night or next day who the burglar was, do certainly throw strong

doubt upon what he says. Still, it is for the jury to weigh the evidence, and whilst, as a jurymen, I should not convict a man on any such evidence, yet, as two juries have in fact done it, and the Judge has refused to interfere, we do not feel authorized to do so. The jury is the tribunal provided by law to pass upon the facts, and especially to consider the credibility of witnesses, and if they believe one man instead of three, or credit a story of a witness that does not appear to us probable, it may be that there was something in the manner of the witness or in his character, which justifies them in the conclusion.

2. The motion based on the newly discovered testimony is not before us. The Judge has never passed upon it. It is still pending. Having been made during the term at which the new trial was refused, it is not too late, even though the bill of exceptions was filed, and it was not, perhaps, proper for the Judge to pass upon it while the bill of exceptions was undisposed of, yet, as the motion was made during the term, it is a pending motion.

We do not undertake to say what the Judge ought to do with this motion. We will, however, say that we think the verdict very weakly supported by the evidence, and that if there be no rule of law in the way, the principles of justice would indicate that any new evidence of weight, discovered in good faith since the trial, ought to be seized upon to grant it.

Judgment affirmed.

E. J. ROACH, plaintiff in error, vs. J. P. TROTTIE, defendant in error.

1. Where a declaration charged that the defendant had, with force and arms and violence, broken the plaintiff's close, and with his feet and one hundred head of cattle, trampled upon and damaged his crop, and the proof showed that defendant was the plaintiff's landlord, that he had undertaken to repair the fence around the close, and in so doing had negligently taken down the fence and exposed the crop to the in-

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gress of cattle ; and there was some evidence going to show that plaintiff had consented to the defendant's going upon the land and making the repairs :

Held, There being no count in the declaration for damages from the negligence of the defendant, but only for the trespass with force and arms, that it was error in the Court to charge the jury, that if the defendant tore down the plaintiff's fence, and cattle got in and destroyed the crop, the defendant was liable for the damages.

2. The effect of the charge was to exclude from the jury the evidence of the plaintiff's consent to the repairs of the fence. If such consent was in fact given, then the defendant was only liable for negligence in repairing the fence, whereas the charge of the Court makes him liable, if he tore down the fence and damage resulted.

Trespass. Landlord and tenant. Pleading. Evidence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Trottie brought trespass against Roach for \$700 00 damages. The declaration alleges that the defendant, on the 15th day of September, 1870, by his agent, James Lawshe, with force and arms, broke and entered the plaintiff's close, containing nine acres, and with his feet and a large number of cattle, tramped upon and damaged the plaintiff's cotton, of the value of \$700 00.

The defendant pleaded not guilty. The following evidence was introduced :

J. P. Trottie, the plaintiff, testified as follows: "I am the plaintiff. I rented from the defendant, as trustee for Mrs. Lawshe and children, the tract of land described in the declaration, for the year 1871. I planted thereon a crop of cotton, and used in planting it \$80 00 worth of guano. About the latter part of August, in that year, James Lawshe tore down a portion of the fence around said cotton patch, for the purpose of building a new one, and left it down for two or three days, so that a large number of cattle came in and entirely destroyed my crop, which was just then opening. I only got two hundred pounds of seed cotton out of the whole field. Seed cotton makes about one-third its weight in lint cotton. I sold some cotton that year at eighteen and a half

cents a pound. The highest price cotton brought that year was twenty cents per pound. It was worth three cents a pound to have picked and ginned the cotton, as it stood in the field, and get it ready for market. It was a good field of cotton, averaged about waist high. It would have made six bales of cotton, averaging four hundred and fifty or five hundred pounds each. No cattle had got in the field before Jim Lawshe tore down the fence, to my knowledge. The fence was a tolerably good one. I never requested defendant, or any one else, to repair it or put a new one there. The defendant told me, after the destruction of my cotton, that he told Jim Lawshe to tear down the old fence, ten panels at a time, and put up the new one as fast as the old one was torn down. He said that he told him not to tear down more than he could put up the same day, so as not to let cattle in."

Plaintiff closed.

The defendant testified as follows: "I never gave Jim Lawshe any direction or authority whatever to interfere with the fence around plaintiff's cotton patch. Mr. Benson told me the cows were breaking in the cotton patch, and asked me to have the fence fixed. Upon which application being made, I employed Judge Hammond to make application to the Superior Court for \$200 00 of the trust estate, to be applied to the fixing of the fence. I received the money and gave it to Mrs. Lawshe, and told her to have the fence fixed, and not to allow, in the repairs, but one panel of fence to be taken down at a time, so that it could be rebuilt as fast as it was taken down. I am trustee of the estate of Mrs. Lawshe, and guardian of the minor children. Early in the year 1871, Mr. Benson came to me to rent the field. I told him he could have it for \$90 00. Afterwards plaintiff came to me to rent it, and I told him if he and Benson would fix the notes all right they could have it. They gave me their notes for \$30 00 each, signed by them jointly and severally, and I supposed they rented the property jointly. I made the application for the money to fix the fence, at the request of Benson and for his benefit, who

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had, according to my understanding, a joint interest in the crop, and for no other purpose."

James Lawshe testified as follows: "Was never instructed by defendant to do anything to the fence whatever at any time; the cattle were getting in the field and destroying the fruit trees as well as the cotton patch, and before defendant had got the money to have the fence repaired, he had bought some lumber at his own expense, and was going to work to repair the fence, but about a week before he commenced repairs he was in the field with plaintiff, under the shade of a willow tree, where he told plaintiff of his intention to make the repairs. Plaintiff told him to do so by all means, and proffered to loan him a mule and cart to haul the posts and lumber around. About a week afterwards he (witness) sent a negro man, by the name of Green Donald, to the plaintiff for the cart and mule. He got them, and hauled the lumber round. He tore down a considerable quantity of fence at the time, and cattle got through into the cotton patch, twenty or thirty head, two or three times; the fence was down as much as three days at one time, but they were breaking in all around the field, and had been in more or less all the summer; had got through the water gap, which was washed out several times, and they got in through the fence, which was old and rotten, was made of boards and easily broken down. The cotton was very poor and the grass was about as high as the cotton. The cotton, if it had been protected entirely, would not have made more than a bale and a half. Plaintiff's brother, Frank Trottie, told him to have the fence fixed, as the cattle were breaking in and damaging the crop of cotton.

John Steward testified that he lived close by and saw the cattle in the field and helped to drive them out once, before Jim Lawshe commenced to build the fence; that they were in several times before; but the time he helped to drive them out they got through the fence where the hogs had rooted off three or four palings. That the water gap washed out two or three times, and the cattle got through that; that it washed

out almost every time it rained much ; that the crop was poor and the grass was about as high as the cotton.

Willie Lawshe testified that the cattle broke into the field all summer, and that he helped frequently to drive them out; that the water gap washed out every time there came a big rain, and cattle frequently got through it into the field; that the crop was a poor one, and the grass was as high as the cotton; that the fence was an old one, made of palings, and the cattle broke through it frequently; that he helped to drive them out.

Green Donald, a colored man, testified that he was employed by James Lawshe to help build the fence, and that he sent him to Mr. Trottie for a mule and cart to haul lumber and posts, and when he went to him, Mr. Frank Trottie, plaintiff's brother, accompanied witness and went into the house of Mr. Benson, and came out again and told him he could get them. He helped him harness up the mule and cart, and witness carried them over to Mrs. Lawshe's and hauled the lumber and posts round the field; that he helped drive the cattle out of the field once, before James Lawshe commenced working on the fence; that they got in that time by breaking through the fence; that the crop of cotton was poor, that the grass was about as high as the cotton; that the cotton growing was about knee high on the upland, and waist high in the bottom. That Jim Lawshe had finished one line of the fence when he came to help him.

Plaintiff, reintroduced, testified that he never had any conversation with Jim Lawshe under the willow tree, and never authorized him to build the fence; that the crop was a good one, and had been well cultivated, and would have made five or six bales of cotton.

C. F. Benson testified that the plaintiff was his wife's brother; that he did sign the notes given to defendant, but that he only signed them as security for the plaintiff; that he had no interest whatever in the crop, except that he expected to receive a share of the profits, if it turned out well, as a compensation for standing security for plaintiff; that he did

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let Jim Lawshe have a horse and wagon to haul posts to build the fence referred to; that he does not recollect ever telling defendant to have the fence repaired, but that he did lend the wagon for that purpose; that the crop was a moderately good one, and would have made a bale to two acres; that the old fence was in rather bad condition, but he thinks it would have protected the plaintiff's crop until it could have been gathered. Defendant told him that he authorized Jim Lawshe to tear down the old fence, ten panels at a time, and replace it with a new one.

Frank B. Trottie testified that he was plaintiff's brother; that the crop of cotton was an extraordinarily good one; that the grass was not as high as the cotton; that in the bottom the cotton was as high as his waist, and in the upland nearly as high; that he never told Jim Lawshe to go ahead and fix up the fence, and that he would hire a hand to help him; that he never had any conversation with Jim Lawshe about fixing up the fence.

Mrs. Phillips testified that she lived in two hundred yards of the Lawshe garden during the summer of 1871; that if any cows got in said garden before Jim Lawshe tore down the fence, she did not know it; that the crop was not injured until after the fence was torn down; that she considered it a very good field of cotton; that she was through it only once during the summer, and there was some grass in it, but not much.

Plaintiff then closed. The Court charged the jury as follows: "If you should find from the testimony that defendant rented the land mentioned in the declaration to the plaintiff, for the purpose of making a crop, and plaintiff took possession of it and planted the crop, and that defendant, during plaintiff's term of renting, tore down the fence, or a part of it that enclosed the crop, and let cattle in upon it, and they injured it, plaintiff could recover to the extent of the injury to the crop shown by the proof. If the fence was torn down by defendant's agent, and by his command or with his assent, and by reason thereof the stock got in and destroyed the crop,

or any part thereof, he would be liable to the extent of the damage. If done by his agent, but not by his command or with his assent, he would not be liable."

The jury returned a verdict for the plaintiff for \$382 50. The defendant moved for a new trial on the following ground: Because the Court erred in charging the jury that "if the fence was torn down by defendant's agent, and by his command or with his assent, and by reason thereof, the stock got in and destroyed the crop, or any part thereof, he would be liable to the extent of the damage."

The motion was overruled, and the defendant excepted.

D. F. & W. R. HAMMOND, for plaintiff in error.

J. T. PENDLETON; T. P. WESTMORELAND, for defendant.

MCCAY, Judge.

1. Whilst we should be very slow to apply to an action of trespass those nice distinctions between trespass *vi et armis*, and trespass on the case, which the English writers maintain, yet our statute, Revised Code, section 3256, requires the plaintiff, "plainly and distinctly to set forth his charge or demand." It requires a considerable stretch to say that this declaration, charging that the defendant by force, broke into plaintiff's close, and with his feet and one hundred cattle, trampled his crop, (with the actual facts as they appear,) distinctly sets forth the plaintiff's charge. Only in one view of it does the writ, even by such a stretch, do this. If defendant, without any permission or consent of the plaintiff, did this by himself or servant, having thus committed a trespass by interfering with the fence at all, he is liable as a trespasser for all the consequences.

2. But if he entered by consent of the plaintiff, to repair the fence, he is only liable if he repaired it negligently. The Judge, in his charge, wholly ignored the evidence of Lawshe, that the plaintiff consented, and furnished the horse, as well as the evidence of Benson, going to show that he was jointly

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interested, and that he consented. And the fact of the joint note is itself some evidence of Benson's interest. The jury were told that if Lawshe, as the agent of defendant, by his command or assent, took down the fence and the cattle got in, the defendant was liable. This made the defendant liable, even if plaintiff consented, and even if there was no negligence. We doubt (if there was consent) whether the plaintiff could recover at all, under the charges of the declaration, unless the negligence was of the grossest character, such as in cases of injuries to a person, would make criminal negligence. We think there ought to be a new trial, because the Judge, in his charge, entirely ignored the evidence going to show that plaintiff consented to the entry of Lawshe, and to the repair of the fence; because, if he did this, the defendant would only be liable, if, in doing this, Lawshe was negligent, and damage came from that negligence.

Judgment reversed.

TAYLOR JENKINS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. When there is a verdict of guilt in a criminal case, and a motion is made for a new trial, on the sole ground that the verdict is contrary to law and to evidence, and the motion is overruled, this Court will not inquire into the sufficiency of the indictment, no such question having been decided by the Judge.
2. Privately stealing any goods, etc., over \$50 00 in value, in any house or building, is, by the Act of February 20, 1873, made a felony. Other forms of larceny from the house remain misdemeanors as prescribed by the Act of 1866.
3. When an indictment charges a larceny from the house of goods over \$50 00 in value, and there is a verdict of guilty, and the evidence justifies the jury in thinking the goods worth over \$50 00, the verdict ought to stand, notwithstanding there is some evidence to show they were worthless.
4. A verdict of guilt means guilty of the charge, as set forth in the indictment.

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Criminal law. Larceny. Verdict. Before Judge HOPKINS. Fulton Superior Court. October Term, 1872.

Taylor Jenkins was placed on trial for the offense of larceny from the house. The only material portion of the indictment was as follows: "For that the said Taylor Jenkins, in the county aforesaid, on the 16th day of December, in the year 1872, with force and arms, did enter the store of William B. Cox and William R. Hill, and did then and there wrongfully and fraudulently steal, take and carry away from said store-house, one barrel of whiskey, containing forty-three gallons, of the goods and chattels of said Cox & Hill, and of the value of \$60 00." The defendant pleaded not guilty. The jury found to the contrary. A motion was made for a new trial, on the ground that the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

The evidence is unnecessary to an understanding of the decision.

THRASHER & THRASHER, for plaintiff in error.

JOHN T. GLENN, Solicitor General, for the State.

MCCAY, Judge.

1. The general charge against the defendant is that he is guilty of "larceny from the house." We think the *evidence* justifies the finding of the jury. He did "privately steal the goods and chattels of Messrs. Cox & Hill in their house." This, under the Act of February 20th, 1873, is felony, if the goods were worth over \$50 00. They are alleged to be worth \$60 00 in the indictment. Mr. Cox swears he had no whiskey worth less than \$1 25 per gallon, and that a barrel holds from thirty-five to forty-five gallons. The drayman swears that the barrel he hauled for defendant was full. There was, therefore, evidence to justify not only the general charge, but that the whiskey was worth \$50 00. So that the verdict of guilty is not contrary to the evidence.

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2. We do not inquire whether this is a good indictment under the Act of February 20th, 1873. It does not charge that the defendant privately stole in a house. There was no decision by the Judge on the validity of the indictment. No point seems to have been made on it. Perhaps a motion in arrest of judgment may yet be made, or error be assigned in the sentence, after this judgment of affirmance is put on the minutes of the Superior Court.

3. There is, without doubt, some confusion in the law as it now stands on the subject of larceny from the house. The Penal Code of 1833 defined larceny from the house as does the present Code, thus: "Theft or larceny from the house is the breaking or entering any house with an intent to steal; or, after breaking or entering said house," etc.: Cobb's Digest, page 794, section xxvi, of the Code.

Section xxvii. punishes as a felony, by imprisonment for not less than two nor more than five years, the offense of privately stealing from or in *any* house.

Section xxviii. punishes *entering a dwelling house*, store, shop, warehouse, or other house or building, with intent to steal, but failing, by detection or prevention, with imprisonment from *one to three years*.

Section xxix. punishes *breaking* the house, with intent to steal, and failing, from detection or prevention, etc., one to three years; but makes putting the inmates in *fear* an aggravation, and in such case, enlarges the penalty to from two to five years.

Section xxx. punishes *breaking and entering* any house—not a dwelling house—(which was burglary,) with intent to steal, but failing, from detection, etc., by imprisonment from two to four years; and also punishes *breaking and entering* any house (not a dwelling house) *and stealing*, with imprisonment from three to five years—making *violence, threat or menace, alarm*, or putting in fear, an aggravation, so as that the penalty is not less than four years.

Plainly here are several grades of the offense of larceny from the house. 1st. "*Privately*" stealing from any house—

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that is, without threat, menace, force, alarm, etc. 2d. *Entering any house with intent to steal and being detected.* 3d. *Breaking into any house with intent to steal, and being detected—aggravated by menaces, etc.* 4th. *Breaking and entering any house (except a dwelling house) with intent to steal, and being detected, etc.* 5th. *Breaking and entering any house (except a dwelling house) and stealing, which may be aggravated by menaces and alarm.* 6th. *Entering and stealing from a hut, booth, tent, or temporary building.*

The Act of 1866 reduced all these grades of "larceny from the house" to misdemeanors. The Act of February 20th, 1873, raises the first and lowest grade, "privately stealing" in any house, to a felony, but says nothing of the other grades—where there is a *breaking*, or *where* there is force, menace and alarm—where it is not "private." We may add that these provisions of the Code of 1834 are carried, word for word, into the Code of 1863, and into Irwin's Code, except that in Irwin's Code, section 4351, there is, in the second clause, a clerical error or misprint of *or* for *and*. We do not think this misprint changes the law. The Convention of 1868 adopted the laws, and only recognized Irwin's Code as an embodiment of them, and did not make a printer's mistake or a copyist's error the law of the land. We think the Act of February 20th, 1873, making "privately stealing" in any house, a felony, does not affect the other grades of this offense. True, it seems absurd to say that one grade should be raised and not the others, but it is not for the Courts to make law, however reasonable it may be. We hope the Legislature may, at its next session, correct this anomaly, as well as some others which have come from the sweeping reduction of felonies to misdemeanors by the Act of 1866.

4. We think this defendant guilty of "privately stealing" in a house from the evidence, and think it was not error in the Court to refuse a new trial on the grounds taken. Whether this is a good indictment we do not decide, as no demurrer or motion in arrest has been made.

Judgment affirmed.

JAMES M. GRAY, executor, plaintiff in error, vs. SAMUEL M. HODGE *et al.*, defendants in error.

1. When a suit was brought, May 27th, 1871, on a promissory note, due before the 1st of June, 1865, and the defendants pleaded the limitation Act of March 16, 1869; and the plaintiff replied that he had brought suit before the 1st of January, 1870, but said suit was dismissed by the Court, as appears by the minutes, thus: "Dismissed for want of jurisdiction," and that the present suit was within six months after the dismissal in January, 1871:

Held, That even if that section of the Code, allowing suits to be brought within six months after dismissal, applies to the Act of 1869, yet, as the first suit was dismissed for "want of jurisdiction," the plaintiff is estopped from saying said first suit was properly brought, or was, in fact, a pending suit, as the Court had no jurisdiction of it.

2. The order of dismissal cannot be explained by parol, so as to show that the reason given for the want of jurisdiction was a wrong reason, and that in truth the Court did have jurisdiction, and that the suit was therefore duly brought.

Statute of limitations. Judgment. Evidence. Before Judge BARTLETT. Jones Superior Court. April Term, 1873.

On May 25th, 1871, suit was commenced by James M. Gray, as executor upon the estate of Nancy T. Parrish, deceased, against Samuel M. Hodge, Henry Christian, and Benjamin T. Finney, on a note made by said defendants on December 2d, 1873, whereby they promised to pay to the plaintiff, on the 1st of December, 1864, \$1,000 00. The defendants moved to dismiss the action upon the ground that it was barred by the statute of limitations.

It was admitted that suit was commenced by the plaintiff against the defendants on December 20th, 1869, returnable to the April term, 1870, of the Court; that at the October adjourned term, 1870, said suit was dismissed by the Court for want of jurisdiction, the consideration of the note sued on being a slave; that within six months of said dismissal suit was renewed on the same note, which last action is sought to be dismissed.

The Court sustained the motion, reciting in its judgment that the first dismissal was "for the want of jurisdiction." To this decision the plaintiff excepted.

BLOUNT & HARDEMAN, for plaintiff in error.

W. A. LOFTON, for defendants.

McCAY, Judge.

1. Whether that section of the Code permitting a plaintiff who has sued before the statutory bar has attached, and whose suit has been dismissed, to sue again within six months from the dismissal, be of force as a qualification of the limitation Act of March, 1869, or not, this action is barred. The plaintiff shows, by his own evidence, to-wit: by the judgment of dismissal, that he did not bring any suit before the 1st January, 1870, in a Court having *jurisdiction*. A suit in a Court having no jurisdiction is no suit at all; it is simply a nullity.

2. What was the ground of the want of jurisdiction does not appear. The judgment, not excepted to at the time, is conclusive that the Court had no jurisdiction. It is not competent now to open that judgment, either to show that it was based on bad law or untrue facts. The judgment does not even come within that class of judgments which the Chief Justice of this Court, in his dissenting opinion, in *Tison vs. McAfee*, refers to, to-wit: judgments, on *their face*, beyond the power, and therefore the jurisdiction of the Court. It is simply "for want of jurisdiction." To permit the party affected by it to show now, by parol, that the *reason* of the Judge for so adjudging was that the debt sued on was a negro debt, would be to permit a judgment, not void on its face, to be attacked by parol, and without any charge of fraud, a practice which, however it might, in this particular case, advance the cause of legal right, would be subversive of the fundamental principles of the law, and against the soundest public policy.

Judgment affirmed.

THEODORE EWING *et ux*, administrator and administratrix, plaintiffs in error, vs. RAPHAEL J. MOSES, JR., administrator, defendant in error.

1. An administrator, with temporary letters, granted by the Ordinary, may institute suit for the purpose of collecting the effects of the deceased, and if permanent letters are granted pending the action, the general administrator thus appointed may be made a party to the action.
2. Whatever may be the remedies that have been provided by statute against administrators and their securities, the concurrent jurisdiction of equity over the settlement of accounts of administrators is specially retained by section 2600 of the new Code.

Administrators and executors. Parties. Equity. Before Judge BARTLETT. Muscogee Superior Court. May Term, 1873.

Raphael J. Moses, Jr., as temporary administrator of George Anderson, filed his bill against Theodore Ewing and his wife, Elizabeth Ewing, as administrator and administratrix of William Matheson, deceased, administrator, *de bonis non*, of George Smith, deceased, for an account and settlement. Pending the litigation, Moses was appointed and qualified as administrator, with full letters. He then moved to be made a party complainant in place of said temporary administrator. The defendants objected, at the same time moving to dismiss the bill on account of the want of authority in the complainant, as temporary administrator, to institute such proceedings. The Court overruled the motion to dismiss, and allowed the proposed amendment. To which ruling the defendants excepted.

PEABODY & BRANNON, for plaintiffs in error.

HENRY L. BENNING ; R. J. MOSES, for defendant.

McCAY, Judge.

1. Under our law a temporary administrator is appointed by the Ordinary, to hold, not simply to the next term of the

Court, but until permanent letters are granted. He gives bond for the faithful performance of his trust, and may, at the discretion of the Ordinary, even sell personal perishable property : Code of 1873, sections 2487, 2488, 2554. It often happens that the estate remains in his hands for years, and it would be a great evil if it were not his right as well as his duty to bring a suit, if necessary, to collect and take care of the assets. Our present law, providing that the temporary letters shall hold until permanent letters are granted, assimilates the office to the limited administrations in England. An administrator *pendente lite*, might, even in England, sue : 1 Williams on Executors, 411. There might, perhaps, be some objections to a suit by an administrator appointed in vacation, to hold only until term time. But a general appointment *pendente lite*, is of a more permanent character, and carries with it, even in England, the right to sue.

2. In the great extension made by our Legislature of the jurisdiction of Courts of law over matters cognizable formerly only in a Court of equity, it is often very difficult to determine whether a particular matter, formerly perhaps of exclusive equity jurisdiction, has not become, by the new law, solely of legal cognizance. By our law now, any subject may be brought before a Court of law for adjudication, and such Court is authorized to do almost anything a Court of chancery might do, and the reply to a bill, that there is an adequate remedy at law, may be made with some show of truth, in almost any case, and yet it is clear that it is the legislative will that a Court of equity, with very large jurisdiction, shall form part of our system of Courts. Perhaps the true line of distinction is that where a definite, specific remedy is given at law, as a writ of partition or garnishment, or petition to foreclose a mortgage, or assert a lien, the jurisdiction of equity is ousted, unless there be some peculiar complication ; but when the matter, formerly of equity jurisdiction, has become cognizable at law only by virtue of the general provision permitting parties to seek remedies at law at their option, the jurisdiction of equity remains if the party sees fit to

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go there. We do not, however, lay down this as the settled rule, though I am myself strongly inclined to the opinion that it is the proper one. Legislation is very desirable upon this subject. The General Assembly has opened the door very widely for equitable relief at law, and whilst the rule still exists that a Court of equity has no jurisdiction if there be an adequate remedy at law, there must necessarily be embarrassment in applying the rule. As to the particular case before us, the power of a Court of equity to hear and determine it would, by the old law, be very clear. It is a demand upon a trustee for an account; a demand upon an administrator for a settlement. True, the parties at interest may sue at law; one heir at law, or distributee, or creditor may bring an action. The executor, administrator or guardian may be compelled to account before the Ordinary. But, by section 2600, (Code, 1873,) a Court of equity is distinctly, and in terms, declared to have jurisdiction over the settlement of accounts of administrators. The settlement of the account is the prime element of the present suit. It depends upon that whether any of these parties are liable, and we think a Court of equity having jurisdiction for that purpose may go on and give full relief in the premises.

Judgment affirmed.

ALFRED PRESCOTT, plaintiff in error, *vs.* MARTIN G. BENNETT *et al.*, defendants in error.

(This case was argued during the January Term, 1873, and decision reserved.)

1. At the December term, 1866, of Clay Superior Court, the plaintiff obtained a judgment against the defendants. At the September term, 1869, the Court "ordered that the same be set aside and forever annulled and made void," upon the ground that it appeared that the consideration upon which it was founded "was a note given for slaves." At the September term, 1872, the plaintiff moved to set aside the last order. The motion should have been sustained.

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2. The judgment rendered at the September term, 1869, vacating the judgment of 1866, on the ground that it was founded on a note given for slaves, was a mere usurpation of power by the Court without any authority of law, and may be declared a nullity collaterally, without any direct proceedings to revise it.
8. It is quite apparent from the several provisions of the Code in relation to setting aside judgments, that parties would not be without a remedy, although they might not have excepted to the same within thirty days after their rendition.

McCAY, Judge, dissented.

Constitutional law. Jurisdiction. Slave debt. Judgments. Bill of exceptions. Before Judge HARRELL. Clay Superior Court. September Term, 1872.

For the facts of this case, see the opinions.

JOHN T. CLARKE; JOHN C. WELLS, for plaintiff in error.

TURNIPSEED & McLENDON; HOOD & KIDDOO, for defendants.

WARNER, Chief Justice.

At the December term, 1866, of Clay Superior Court, the plaintiff obtained a judgment against the defendants for the sum of \$4,019 79, principal, and \$1,861 15, interest. At the September term of said Superior Court, in 1869, the Court passed the following order, after stating the names of the parties and reciting the judgment obtained at December term, 1866: "It appearing to the Court that the consideration upon which the above judgment was founded was a note given for slaves, it is ordered that the same be set aside and forever annulled and made void." At the September term of the same Court, in 1872, the plaintiff made a motion to set aside and vacate the order and judgment made at the September term, 1869, setting aside and annulling the judgment obtained at the December term, 1866, on the ground that the Court had no jurisdiction to render such vacating judgment, and because said judgment shows upon its face, that it was rendered on a ground wholly unknown to the law as a cause for

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vacating said judgment, which latter motion the Court overruled, and the plaintiff excepted. The judgment rendered by the Court, at September term, 1869, setting aside and annulling the judgment of 1866, on the ground that it was founded on a note given for slaves, was a mere *usurpation of power* by the Court, without any authority of law to award such a judgment for that cause, and may be declared a nullity collaterally under the provisions of the Code without any direct proceeding to reverse it, for the reasons stated in the case of *Tison, administrator, etc., vs. McAffee, et al.* The principles of law applicable to the judgment of dismissal in that case are also applicable to the judgment of 1869 in this case, and should control it. The judgment of 1869 has no foundation for its support by any law of the land for the cause for which it was rendered, as is apparent on the face thereof, and cannot stand any more than a house could stand without any foundation for its support. It is quite apparent from the several provisions of the Code in relation to setting aside judgments, that parties should not be without a remedy, although they might not have excepted to the same within thirty days after the same were rendered. If that had been intended as the *only remedy* for parties to have got rid of judgments for any of the causes specified therein, the provisions of the Code would not have been enacted. I know of no principle of the common law, or of any municipal law, or moral law, or any other law which would have authorized the Court below to deprive the plaintiff of his vested right to recover the amount of his judgment obtained in 1866, for the cause apparent on the face of the judgment of 1869, and to give the same to the defendants, unless it is that old primitive law, the *simple plan* recognized by Rob Roy when he plundered on the Scottish border, to-wit: "That they should *take* who have the power." "And they should *keep* who can."

Let the judgment of the Court below be reversed.

TRIPPE, Judge, concurring.

At the December term, 1866, of Clay Superior Court, plaintiffs in error obtained judgment against defendants in error, on which execution was issued on the 4th day of March, 1867. On the 15th of July, 1869, defendants served plaintiff's attorney with a written notice, of which the following is a copy :

"GEORGIA—CLAY COUNTY.

"To Alfred Prescott: You are hereby notified that we will apply at the next Superior Court, to be held in and for said county of Clay, on the fourth Monday in September next, to have the judgment, upon which the above *fi. fa.* is founded, set aside and forever made void, because the consideration of the debt was slaves."

This notice was signed by defendants, by their attorneys, etc., and in the caption thereof had a statement of the *fi. fa.* At the September term, 1869, the Court, upon said application, and without any answer thereto being made by plaintiffs, so far as appears in the record, passed the following order:

"It appearing to the Court that the consideration upon which the above judgment was founded, was a note given for slaves, it is ordered that the same be set aside and forever annulled and made void."

Notwithstanding this order or judgment, plaintiffs, on the 25th of June, 1872, had the *fi. fa.* levied on the property of defendants, and defendants filed an affidavit of illegality, setting up, amongst other grounds, the order of the Court above given. This affidavit was heard at the September term, 1872, and the Court adjudged that all the other grounds taken therein be overruled, and that the one setting up the previous order, declaring plaintiff's judgment null and void, be sustained, "the Court holding that the judgment vacating the judgment of the plaintiff is valid." On the same day said hearing was had, plaintiffs having given notice to defendants, filed a motion in writing to set aside the judgment granted at the September term, 1869, on the grounds: 1st, That the

Court had no jurisdiction to render such vacating judgment. 2d. That said judgment shows on its face that it was rendered on a ground wholly unknown to the law as a cause for vacating a judgment. Upon the hearing of this application, which was had the day it was filed, and within three years from the time the judgment sought to be set aside was granted, the Court overruled the same. Plaintiffs excepted to the rulings in the case of the affidavit of illegality, and in the motion to set aside, and one bill of exceptions brings both decisions to this Court. The same principles apply to the consideration of each decision, and it is only necessary to notice them, as to one of said rulings, the decision refusing the motion to set aside. If that judgment be affirmed, then both must stand; if it be reversed both must necessarily fall. Two questions are presented :

1st. Was the order of the Court passed in September, 1869, forever annulling, setting aside, and making void the judgment of the plaintiffs, rendered in December, 1866, because the consideration of the debt was slaves, a "legal judgment" within the meaning of that term, as used in the Code?

2d. If it was not a "a legal judgment," did plaintiff lose his right, by lapse of time, or rather the statute of limitations, to a motion to set it aside?

Section 3529 of the Code says: "When a judgment has been rendered either party may move in arrest thereof, or to set it aside for any defect not amendable, which appears on the face of the record or the pleadings."

The latter clause of section 3530 declares, "The motion in arrest of judgment must be made during the term at which such judgment was obtained, while a motion to set aside may be made at any time within the statute of limitations."

Section 3531 says: "If the pleadings are so defective that no legal judgment can be rendered, the judgment will be arrested or set aside."

Section 3532 provides that "a judgment cannot be arrested or set aside for any defect in the pleadings or record, that is aided by verdict, or amendable as *matter of form*."

Was, then, the order of September, 1869, a "legal judgment," or rather, were the pleadings and record on which that judgment is founded "so defective that no legal judgment could be rendered thereon."

The terms, "no legal judgment," used in the Code, evidently means something different from a judgment which is void. For the right to move to set aside a judgment obtained on pleadings so defective that "no legal judgment" can be rendered, is limited to a period "within the statute of limitations." What that period may be is not expressly stated, but the time is limited. In the case of a void judgment, "void for any cause, it is a mere nullity, and may be so held in any Court *when* it becomes material to the interest of the parties to consider it:" Code, section 3536. The right to attack a "void judgment" is never lost. No lapse of time estops it; no statute of limitation bars it. This is the rule at common law, and the Code recognizes it. The right to attack a judgment because it is obtained on pleadings so defective, that they can support "no legal judgment," is expressly, by the Code, restricted to a time "within the statute of limitations."

Whether, then, such a judgment be called "voidable," or, in the words of the Code, "no legal judgment," it is clear and positive that by the provisions of the Code, a judgment thus rendered, though it may not be a void judgment, may be either arrested during the term at which it was obtained or set aside at some subsequent term, provided the movant is "within the statutes of limitation."

It may be further said, that by the two sections of the Code quoted, it appears that what would be good in arrest of judgment, would sustain a motion to set aside. The words are, if the pleadings are so defective that no legal judgment can be rendered, the judgment will be *arrested or set aside*—arrested if the motion be made during the term at which it was obtained, or set aside if the motion, when made, be not barred by the statute of limitations. It may be asked why is the motion to arrest restricted to the term, and a motion to set aside allowed afterwards, when both are grantable on the same

grounds. I will only reply to this by saying that it is more correct to call it an arrest of judgment, when it is made during the term, for then the judgment may not have been rendered, or if rendered, it is still during that term, within the breast of the Court, in *feri*; whereas, after the term has ended, the judgment is complete, and before the ensuing term, might probably be enforced, and by the terms of the process issued thereon, generally, is to be enforced within that time. After all this occurs, a motion to set it aside is, in every sense, the proper mode, and is properly so called.

The point in this is to show the resemblance between a motion in arrest and a motion to set aside, as recognized in the sections of the Code quoted. It is true, that a motion entitled a motion to set aside, is sometimes made for matters extrinsic the pleadings or record. In such cases, they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect.

The first question, then, may be put in two forms: Was the judgment granted in September, 1869, a judgment founded on pleadings, or a record so defective that a motion in arrest thereof could have been made and sustained at that term; or, generally, was it founded on pleadings so defective that no legal judgment could have been rendered? No one can deny that the pleadings and record showed no ground for any motion; no right to what it asked; no cause of action; nothing on which to rest a judgment. The motion prayed the Court to vacate a valid legal judgment, because the consideration of the debt was slaves. It might as well have been, so far as it furnished a ground for the judgment invoked, because the consideration was land or bank bills; or, because it was not gold or silver, or simply because the defendants did not wish to pay the debt. Such a cause shown in any declaration, petition, motion, or other pleadings, furnishes nothing to support any judgment. It would be a case where the pleadings would be so defective that no legal judgment could be rendered. If a verdict had been obtained in such a case, surely there would be a ground for a motion in arrest of judgment,

if made during the term. If a motion in arrest could be sustained because no legal judgment could be rendered, why, then, if the judgment had been rendered, would not a motion to set it aside be sustained on the same ground? The Code, in plain terms, grants the right to such a motion.

At common law the rule is, and so it is under the provisions of the Code: "When anything is omitted in the declaration, though it be matter of substance, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment:" 2 Tidd's Practice, 919. "This rule, however," says the same authority, "is to be understood with some limitation; for when the plaintiff has stated his title or ground of action definitely, or inaccurately, (because to entitle him to recover all circumstances necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial) it is a fair presumption, after a verdict, that they were proved; but that when the plaintiff totally omits to state a title or cause of action, it need not be proved at the trial, *and therefore there is no room for presumption.* And hence it is a general rule *that a verdict will aid a title defectively set out, but not a defective title*, or, in other words, nothing is to be presumed after a verdict but what is expressly stated in the declaration, or necessarily implied from the facts which are stated:" *Ibid.*, 919.

In the case at bar there is not simply a defective ground or cause, but there is no cause, no ground. The application gives a reason why the movant asks the judgment. But it is a reason that no authority, no enactment, statutory or organic, could make or convert into a ground on which a legal judgment could be rendered or be made to support a judgment. If neither the Legislature nor the people, in convention assembled, could make such a reason, so to call it, a ground or cause on which the Court could render a legal judgment, is not such a judgment, if rendered without this or any authority, obtained on pleadings so defective that no legal judgment could be rendered thereon. If the provisions in the Consti-

tution of 1868, under which it is taken for granted this judgment was rendered, were valid and operative, it forbade this very judgment, and denied jurisdiction to the Court to render it. Under that provision it would have been void—a nullity: 40 *Georgia*, 341. That provision of the Constitution has been declared void itself—and there is no law that can make the cause of action or ground given in the application such as to save the pleadings from being so defective that no legal judgment could be rendered.

I do not consider the judgment which is sought to be set aside a mere erroneous judgment, or that it is now asked to be set aside for a mere error of law supposed to have been committed by the Court in rendering it. The rule in such cases is well known and is fully recognized. Such errors or erroneous judgments, supposed to exist in the decision of a Court at a previous term, are not a sufficient justification for revising and annulling them at a subsequent term in a summary way, on motion: 6 How. R., 38; 13 Peters, 511; 4 Cranch, 241. Such is the uniform rule of both American and English decisions. But this case goes far beyond the line set up by these authorities. The judgment rendered in September, 1869, was more than an erroneous judgment—a mere error of law. It was founded on that on which no legal judgment could be rendered. It may have the face of brass, but its feet are of clay. Nay, more; its face shows the same element that constitutes the weakness of its foundation.

If a suit be brought on a parol contract which the statute of frauds require to be in writing, and nothing is alleged to be in writing, and nothing is alleged to bring it within any of the exceptions, the plaintiff obtains a verdict it will be presumed that the facts necessary to take it out of the statute were proven, and the judgment will be sustained. Such defects are aided by verdict. But if the pleading show the alleged cause of action is illegal, or for something legally criminal, no legal judgment can be rendered, or it can be arrested if moved against during the term at which it is rendered, or under the Code can be set aside subsequently, if motion be

made within the proper time. When the pleadings show no cause of action whatever, they can be no more available to sustain a judgment than if the cause shown be immoral or illegal.

The second question is, was this motion to set aside the judgment rendered in September, 1869, made within the proper time. The words of the Code, already quoted, are: "A motion to set aside may be made at any time within the statute of limitations." No particular limitation is referred to. The question must be solved by reference to such provisions in the statute as by analogy are applicable. Before this provision in the Code was adopted there was no uniformity of practice in the matter of setting aside a judgment, so far as concerned the time in which it could be done. Each case was within the discretion of the Court, and rested on its own merits. Section 2868 of the Code says all bills of review or for a new trial, in a Court of equity (unless the latter be founded on proof of perjury in a material witness for the successful party) shall be brought within three years after such a decree or judgment has been rendered. I am of opinion that the new trial referred to in this section means a new trial both in equity causes and causes at law; for it speaks of the *judgment or decree*, relief from which is sought in the new trial prayed for. Besides, there can be no good reason to confine it to new trials in equity cases, and there is as much necessity for its applying to cases in one tribunal as in the other. It probably might not be a far-fetched analogy to say that this is the period intended in section 3530 of the Code. The section prescribing the time within which a judgment shall become dormant or barred if not revived, does really, in my opinion, suggest more reasons why that should be taken as the proper time than the one first cited. The judgment of the plaintiff would become dormant within seven years from its rendition unless saved by the proper entries. If, when the order vacating it was granted, three years had transpired, and in four years more it would become dormant, it would look reasonable to say that the plaintiff should have that period of

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time to move to set aside the vacating order, which would be required to elapse before his judgment would be barred. After that time the right to make such a motion could be of no avail. For if the judgment would have become of no force, or barred, a motion setting aside the vacating order could only leave nothing on which to found further action. *Lex non frustra facit* is one of the primary principles of our jurisprudence. The law will not attempt to do an act which would be fruitless. Brown's Legal Maxims, and Kent, Chief Justice, say: "This is a maxim of our legal authors, (Brown's Legal Maxims, 185; 3 John. R., 598,) as well as a dictate of common sense."

But, be the time three years, or the four years unexpired of the seven, counting from the time when the order of 1869 was passed to the time the judgment would become dormant, this motion was made within either of those periods. It was not quite three years from the day in September, 1869, when the vacating order was granted, to the 24th of September, 1872, when the motion to set aside was made, and the judgment here complained of as error, was rendered; and seven years from the date of the original judgment which was vacated, would not have expired until more than a year after this motion to set aside was made.

I am strongly inclined to the opinion that the true rule for the interpretation of the clause limiting the time in which a motion may be made to set aside a judgment under the provisions of the Code cited, and which is expressed in the words "within the statute of limitations," is, that rule which would limit the time to that period in which the right, or the right of action, growing out of the matter which is, *sub judice*, would become barred by the statute of limitations. This rule, in my opinion, is most consistent with the correct principle of construction as furnished by all the analogies of the law. The words, "within the statute of limitations," are not clear and positive as to the time, and we are compelled to search for a proper construction. If seven years be adopted as the fixed period in all cases, by analogy to the time in which a

judgment becomes dormant, we have the singular anomaly in the case of setting aside an order vacating a judgment, against which six years have already run, of allowing a motion seven years thereafter to set aside, when the judgment itself would have become nearly twice over dormant and barred. The plaintiff would take his order, but the fruit thereof would be the fruit of the Dead Sea, and the law be made to do a vain thing.

Again, where a suit on an account against which the statute had run three years was dismissed in some proceeding which would authorize the setting aside the order of dismissal, and seven years after that, when the debt had become barred by nearly three times the statutory period, and the plaintiff failing for a year to recommence his suit, he could review the whole litigation by a motion to set aside the order dismissing his suit, and which was granted at a time so far back that nearly double the time necessary to bar his right of action had elapsed since the order itself was passed of which he complains. But the rule I have stated presents no such difficulty. It does not invite litigation, nor does it subject the Courts to the hazard of the abolition of the principle, *interest reipublicæ ut sit finis litium*. It allows to the party plaintiff, who comes within the principle, his motion to set aside, within the time, and that time only, beyond which he would be barred by non-action—and of course he could have no legal or other ground of complaint that it was not longer. If he be defendant and be likewise within the principle, he would be limited to a similar period, to-wit: such a period within which this cause of action he is contesting would not be barred; or, if his motion grow out of some counter right or cause of action set up by him, then to such a period within which it would not be barred.

Thus the spirit and principle of the statute of limitations, as it applies different periods to different rights or causes of action, would be preserved and applied, as by the statute the case might require. And the rule that comes nearest to this, is, in my judgment, the proper one whereby to construe the

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words, "within the statute of limitations," when they are used to designate the time in which a motion to set aside may be made.

For these reasons, and as this motion was made in the proper time, I concur in the judgment reversing the judgment of the Court below.

McCAY, Judge, dissenting.

This was a motion made at September term, 1872, of Clay Superior Court, to set aside a judgment of that Court, rendered at September term, 1869, on the sole ground that, from the grounds set forth in the motion of September term, 1869, and from the reasons given in the judgment itself, it is apparent that the Court erred in its judgment as to what was the law. As no motion was made during the term to reconsider, and no bill of exceptions was filed within thirty days after the adjournment of September term, 1869, it is my opinion, that both parties to that judgment are, by the settled rules of law, and the universal practice of Courts, conclusively presumed to have acquiesced in the judgment, and that any error of the Judge at September term, 1869, cannot be made an error of September term, 1872, so as thus to save the party from his *laches* in not then taking the steps provided by law for correcting the errors in law of the Judges of the Superior Courts in the judgments they render. The judgment sought to be set aside is not irregular. It was formally made in writing, with notice to the other party; it was regularly passed upon, and the judgment entered on the minutes of the Court. There is no complaint of surprise, fraud, mistake of fact, providential hindrance, or of any failure on the part of the movant to conform to the practice of the Court in such cases. the judgment is not, therefore, irregular. No extraordinary cause exists for a new trial. Nor is it void. The Court had jurisdiction of the parties, and of the subject matter. Of the parties, for the motion was on notice to the other side, and of the subject matter, for a Court may always entertain a motion to set aside its former judgments for want of jurisdiction in

the Court to enforce them. At last, therefore, it seems to me, that the sole objection to the judgment of September term, 1869, is, that the Court was in error in his opinion of the law. And as, in my judgment, this proceeding has for its sole object the purpose to escape the *laches* of the party in failing to file his bill of exceptions within thirty days after the adjournment of September term, 1869, I am compelled to dissent from the judgment of reversal.

ISAAC P. TISON, administrator, plaintiff in error, vs. WILLIAM M. MCAFEE *et al.*, defendants in error.

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128	463

[This case was argued at the last term of the Court, and the decision withheld.]

At the September term, 1869, of Lee Superior Court, an order was passed dismissing plaintiff's suit, because the consideration of the note sued on was a slave. At the November term, 1872, a motion was made to reinstate the case. The note sued on was dated January 3d, 1863, and due January 1st, 1864. As this motion was not made until nearly three years after the note sued on was barred by the statute of limitations, nor within three years from the time the order of dismissal complained of was passed; therefore, whether under the right granted by section 3530 of the Code, the words, "within the statute of limitations" be construed to mean three years, in analogy to the statute prescribing that period as the time within which a bill for a new trial must be brought, or to mean that period within which the plaintiff's cause of action would be barred, this motion was not made in time, and was properly overruled. (R.)

New trial. Slave debt. Judgments. Statute of limitations. Before Judge CLARK. Lee Superior Court. November Term, 1872.

For the facts of this case, see the opinions.

C. T. GOODE; W. A. HAWKINS, for plaintiff in error.

G. W. WARMICK; R. F. LYON, for defendants.

TRIPPE, Judge.

The suit of plaintiff was dismissed at the September term, 1869, of Lee Superior Court, by an order of the Court entered on the minutes, reciting that it was dismissed because the consideration of the note sued on was a slave. At November term, 1872, a motion was made to reinstate the case on the docket, and that it stand for trial. The Court overruled the motion, and on this refusal error is assigned. The motion, in effect, was to set aside the previous order of the Court granted in September, 1869, in so far as that order dismissed the suit of plaintiff. To that extent only do we consider the question as presented in the record. The note sued on was dated February 3d, 1863, and due January 1st, 1864.

It will be observed that the motion to reinstate was not made until nearly three years after the note sued on ; the cause of action was barred by the statute of limitations. Nor was it made within three years from the time the order of dismissal complained of was passed. Whether, under the right granted by section 3530 of the Code, the words, "within the statute of limitations" be construed to mean three years, in analogy to the statute prescribing that period as the time within which a bill for a new trial must be brought, or to mean that period within which the plaintiff's cause of action would be barred, this motion was not made in time.

The views I have presented in the case of *Prescott vs. Bennett et al.*, in which judgment has just been pronounced, I refer to and repeat here. In that opinion I confined the argument chiefly to stating why the seven years in which a judgment would become dormant was not applicable as a fixed, invariable time, to bar a motion to set aside, and why the principle involved in the second rule stated above, furnished, in my opinion, a more equitable and correct rule. I propose to suggest some reasons why such a rule would be more reasonable and preserve legal consistency more strictly than the one of three years, in analogy to the time for bringing a bill for a new trial. I remark, generally, as I did in *Prescott vs.*

Bennett, that that rule is clearer and more satisfactory in all its applications, by which the words of the Code, which have been cited, shall be construed to mean that the time in which the motion may be made shall be limited to that period in which the right, or the right of action growing out of the subject matter under judicial consideration, would become barred by the statute of limitations. This would be in harmony with the principle which sets up many different periods of limitation for different rights or causes of action. It would simply secure to a party, in a proper case for such a motion, the same time to assert his legal rights by the motion, which he would have to assert them in some other forum; no rule would be departed from, no principle violated, no right claimed that did not clearly exist, and which, if it could not be set up in that mode and in that forum, could be asserted in some other mode, or in another forum. Any other rule—a rule, for instance, which would fix one procrustean standard, one absolute and fixed period for all cases—might have the virtue of absoluteness, but it would be wanting in the greater virtue of having the quality of accommodating itself to and preserving that principle which, by the wisdom of all law-givers, prescribes a different measure of limitation for some cases than is prescribed for others. If the three years which is given as a limitation to bring a bill for a new trial be taken as the standard, it is obnoxious to that objection. In the case of a suit on an unliquidated account, dismissed after more than three years of the statute had run, and in a manner which would entitle the plaintiff to the motion to set aside the order of dismissal, it would grant the same time which would be allowed in a case of dismissal of an action founded on a contract that might have ten or fifteen years to run before it was barred by the statute. Indeed, in the case of the action on the account, whether it would be barred in six months or three years, the same period of limitation as to the right to reopen litigation would be allowed. And so in cases of promissory notes, whether five months or five years would bar an action on them, the same absolute period would

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apply, and the same motion could be made in one case, even though several years after the debt had been barred, as could be made in the other, where several years would have to elapse before the bar of the statute would attach. When those causes of action are considered in which the right of action is limited to twelve months, as in a case of slander, or to two years, as in certain cases of trespass, the injustice and inconsistency of such a rule are more apparent. An action for words, where it would be trebly barred, could be reopened by a mere motion, with all the privileges as to time, that a plaintiff might have upon whose right of action the statute had scarcely made an inroad. For wise purposes these distinctions have been made between different actions by the statute of limitation, and Courts should look to them in adopting a rule of construction, and in applying and observing those distinctions whenever it becomes necessary in construing such general words as those now under consideration. The rule I have suggested is free from the inconsistencies referred to, preserves in full the whole spirit of the statute of limitations, and is not obnoxious to the charge of doing violence to the ancient legal maxims approved of in all Codes, by meting out the same measure to the vigilant and the slothful.

It has been argued that the decisions of the Courts on this class of debts, by inducing such creditors to pretermitt all efforts for their recovery, furnishes a ground to be considered in determining the plaintiff's right in this case. The order sought to be set aside was passed at the September term, 1869. At the December term, 1869, the question was decided by this Court as to the power of the Courts to hear and determine just such questions, and it was held that no such power existed; that under the provisions of the Constitution, by virtue of which such power was claimed, the jurisdiction was denied: 40 *Georgia*, 241. This decision would have been authority for several terms for the case to have been reinstated. But no motion was made. It is said that to have reinstated it, would, under the view then entertained of the law and the Constitution, have been of no avail to the creditor. But at

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that time the question had been made and was pending before the Supreme Court of the United States, whether the clause in the Constitution that stood in the way of the creditor was valid, and it was decided to be void. This Court was divided in opinion on the matter. The question then is, shall a party, whose case has been dismissed, who could have reinstated it for several terms under the decisions then of force, but who does not move for several years, and until his claim is barred by the statute of limitation, as well as his right to relief in equity, shall such a party, suddenly awakened by the results of a contest in which he would not engage, nor even ask to be placed back on the record, so that he might be on the line of safety, be allowed his demand to share the fruits of victory won by the energetic and the vigilant? To state the question is to answer it. I know of no principle of law or equity which would sanction it: See *Hudson vs. Carey*, 11 S. & R., 10.

I would remark that in recovering from the errors produced by a sort of abnormal condition in which the country was thrown by a revolution, we should be careful not to commit others that might be equally as hurtful to the ancient landmarks established by the law and always enforced by the Courts. As this motion was not made within the time required by law, I am of opinion that the judgment of the Court below, overruling the same, should be affirmed.

Judgment affirmed.

McCAY, Judge, concurring.

I concur in the judgment of affirmance, but I do so on the sole ground that the plaintiff in the original suit, Tison, having failed to move at the term at which the judgment was had to set aside the order dismissing his case, or to file a bill of exceptions to the decision within thirty days after the adjournment of the Court, he is to be conclusively held to have assented to the judgment, and cannot at a subsequent term, thus escape the consequences of his own *laches*.

WARNER, Chief Justice, dissenting.

On the 5th day of March, 1867, the plaintiff instituted his suit against the defendants in the Superior Court of Lee county, on a promissory note for the sum of \$4,000 00. The suit was pending on the docket of said Court until the 30th of September, 1860, when it was dismissed by the Court, because the consideration of the note was for slaves. The following is the judgment of the Court, dismissing the plaintiff's action: "It appearing to the Court that the consideration of the note upon which said case is founded, is slaves, which this Court has no jurisdiction to enforce, it is ordered by the Court that said case be dismissed."

At the November term, 1872, of said Court, (it being the first term after the Supreme Court of the United States had decided that the provision of the State Constitution denying jurisdiction to enforce slave debts was null and void,) the plaintiff made his motion to have said judgment, dismissing his case, set aside, and that the same be reinstated on the docket, on the ground that it had been improvidently dismissed therefrom by the Court. The motion to set aside the judgment and reinstate the case was refused, and the plaintiff excepted. The plaintiff's suit on the note was instituted prior to the adoption of the Constitution of 1868. Assuming that provision of the Constitution of 1868, which denied to the Courts of this State jurisdiction or authority to try, or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof, to have been a valid law, the plaintiff's case was improvidently dismissed, even under that pretended law, as was held by this Court in *Ransome vs. Grist*, 40, *Georgia Reports*, 241. The plaintiff's case was properly and legally on the docket of the Court, and the Court had no legal power or authority to dismiss it out of Court, but should have left it on the docket where it was placed in accordance with the law of the land.

But, it is said that although the Court may have acted improvidently, and without authority of law, in dismiss-

ing the plaintiff's case, he is not now entitled to make his motion to set aside the judgment of dismissal, and have his case reinstated on the docket, because he did not except to the action of the Court in the matter and have its judgment reversed; that he is now *concluded* from making his motion to set aside the judgment and have the case reinstated.

It is true, the plaintiff might have excepted to the judgment of the Court dismissing his case, and have prosecuted his writ of error to this Court, and from this Court to the Supreme Court of the United States, and have had the judgment reversed and set aside as being null and void; but the question is, was he bound to do so in order to get rid of a *void judgment*? In other words, was excepting to the judgment within thirty days the *only remedy* which the plaintiff had, according to the general principles of the law and the provisions of our Code, to have that judgment set aside, and his case reinstated?

What is a judgment? "Judgments (says Blackstone) are the sentences of *the law* pronounced by the Court upon the matter contained in the record. The judgment, though pronounced or awarded by the Judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stands thus: Against him who hath rode over my corn, I may recover damages *by law*; but A hath rode over my corn, therefore, I shall recover damages against A:" 3, Bl. Com., 396. It necessarily follows, therefore, from this definition of a judgment, that it must be founded on some law of the land; in other words, the law of the land must authorize such a judgment to be rendered for that cause, otherwise, it is the mere arbitrary caprice of the Judge—his own judgment, and not the judgment of *the law*. If there was no law against him who rode over my corn which would authorize damages to be rendered therefor, then, a judgment against A for damages, on proof of the fact that he had rode over my corn, would be a nullity, because the Court had no power or authority of law to render such a

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judgment. Where there is no law, there is no transgression. If a Judge, presiding in a Court can, of his own mere arbitrary caprice, award a judgment, without any law of the land to authorize him to do so, it would be in violation of the fundamental principles of *magna charta*.

Bacon, in speaking of the several Courts in England which exercise jurisdiction there, says: "All these are bounded and circumscribed by certain laws and stated rules, to which, in all their proceedings and *judicial determinations*, they must square themselves:" 2 Bacon's Abridgement, 625, title Courts, letter D. "A Judge ought to act conformably to *law* and not according to his discretion:" 4 Comyn's Digest, top page 731, letter I. "Every power exercised by any Court must be found in and derived from *the law of the land*; and also be exercised in the mode and manner that law prescribes:" 6 Dane's Abridgement, 423, chapter 187, Article 17. "The question, whether a Court, or magistrate, has jurisdiction of any cause, must always be decided by comparing the authority either has, by law or usage, or both, and the power to be exercised in deciding *the cause*:" 5 Dane's Abridgement, 223, chapter 146, Article 5.

Now, the legal presumption undoubtedly is, that a Court, having jurisdiction of the person and the subject matter, proceeds according to law in pronouncing its judgment, unless the contrary appears on the face of the judgment; but if it appears on the face of the judgment that it was rendered for a cause not authorized *by law*, and without *any law* to authorize the Court to award such a judgment for that cause, then it is void. In *Rex vs. Gayer*, (1 Burrow's Reports, 246,) there was a motion to quash the order and judgment of the Court of Sessions. Lord Mansfield said: "If they had given no reasons, their order had undoubtedly been good; we must have presumed that they acted on proper grounds; but it is true that where the whole reason is set out, and is clearly wrong, we may, and ought to quash an order manifestly made by mistake, upon an erroneous foundation.

Now let us apply these general principles of the law before

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cited, to the case before us. It appears on the face of the judgment, dismissing the plaintiff's case out of Court, that it was done on the sole ground that the consideration of the note upon which the suit was founded was slaves.

Suppose the Court had dismissed the plaintiff's case on the ground that he was a bald-headed man, or on the ground that he was a club-footed man, or on the ground that the consideration of the note was gold coin, and all or either of the grounds had appeared on the face of the judgment, as the cause for its dismissal, will any one pretend that there was any *law of the land* that would have authorized the Court to have awarded such a judgment? Would such a judgment have been the sentence of any law of the land? Would it not have been the mere arbitrary caprice of the Judge who uttered that judgment without authority of any law—mere *brutum fulmen*? The Court had the same legal power and authority to dismiss the plaintiff's case on the ground that the consideration of the note was slaves, as it would have had to dismiss it on either of the grounds above stated, and *no more*. There is no law of the land to authorize any Court to award such a judgment for any such cause as is apparent on the face of this judgment; it carries its *death wound* on its face. The general principles of the law applicable to the judgment now before us, were discussed and recognized in the case of *Griffith vs. Frazier*, 8 Cranch's Reports, 9. The question in that case, was whether the judgment of a Court, having jurisdiction of the subject matter and upon the facts before it, had the *authority of law* to render the judgment which it did. It was contended that the judgment, having been rendered by a Court of competent jurisdiction having cognizance of the subject matter and not being appealed from, was conclusive until reversed; that the judgment was merely erroneous and voidable, but not void. Chief Justice MARSHALL, in delivering the opinion of the Court, said: "This argument has been very strongly urged, and there is great force in it. The difficulty of distinguishing those cases of administration in which a Court having general testamentary jurisdiction may be said to

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have acted on a subject *not within its cognizance*, is perceived and felt, but the difficulty of marking the precise line of distinction, does not prove that no such line exists. To give the Ordinary jurisdiction, a case in which, *by law*, letters of administration may issue, must be brought before him. Suppose administration to be granted on the estate of a person not really dead, the act, all will admit, is totally void; yet, the decision of the Ordinary that the person on whose estate he acts *is dead*, if the fact be otherwise, does not invest the person whom he may appoint with the character or power of an administrator. The case, in truth, was not one *within his jurisdiction*. It was not one in which he had a right to deliberate. It was not committed to him by the law. And, although one of the points occurs in all cases proper for his tribunal, yet, that point cannot bring *the subject* within his jurisdiction." In that case, the Court held the judgment void. Whenever it appears on the face of the record and judgment, that it was rendered for an alleged cause of action or subject matter, without authority of any law to authorize or support it, the judgment may be arrested or set aside, on motion, as provided by the Code. The 3529th section declares: "When a judgment has been rendered, either party may move in arrest thereof, or to set it aside for any defect not amendable, which appears on the face of the record or pleadings."

The plaintiff might have moved in arrest of this judgment at the time it was rendered, for the simple reason that there was *no law* to authorize such a judgment to have been rendered for *the cause* apparent on the face of it. The judgment could not have been amended for the same reason. A motion to set aside a judgment may be made at any time within the statute of limitations: Code, 3530. If this motion to set aside the judgment was made in time, there is no *laches* imputable to the plaintiff. If the pleadings are so defective that no legal judgment can be rendered, the judgment will be arrested or set aside: Code, 3531. The only pleadings in this case is the judgment itself, and it appears on the face

thereof that it was rendered for a cause unknown to *the law*, and without authority of *any law* to make it a legal judgment. There is no legal foundation for its support, it has no legal validity whatever, and should have been set aside on the motion of the plaintiff in the Court below. The judgment of a Court having no jurisdiction of the person *and subject matter* or *void for any other cause*, is a mere nullity, and may be so held in any Court when it becomes material to the interest of the parties to consider it: Code, 3536. This judgment of dismissal for the cause apparent on the face of it, was without the authority of any law of the land, and for the reasons hereinbefore stated, was a mere nullity. It was not an irregular or erroneous judgment, but a void judgment, and the plaintiff should have been allowed to have had his case reinstated on the docket, where, by law, he was entitled to have it. This judgment, as appears on the face of it, was a mere *usurpation* of power by the Court without any authority of law, and may be declared a nullity collaterally without any direct proceeding to reverse it; it was rendered for a cause of which the Court did not have cognizance by any law of the land. The Court had no more *lawful* power or jurisdiction to dismiss the plaintiff's case for *the cause* apparent on the face of the judgment than it would have had to dismiss it because the plaintiff was a member of the Methodist Church, or because he was a member of some other church.

If the judgment of dismissal stood in the plaintiff's way, as the Court below held it did, he was entitled to have had that judgment set aside under the provisions of the Code, although he did not except to it when it was rendered; he was not bound to except to a void judgment to get it out of his way, but might so consider it and so treat it whenever it became material to his interest to do so. This is not a case in which the Court erroneously construed a valid law, or erroneously misapplied a valid law to the facts of the case by its judgment, but it is a case in which the Court awarded a judgment for a cause wholly unknown to the law of the land, and

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without any law to authorize such a judgment to be rendered by any Court, as is apparent on the face of it. If a plaintiff had brought an action of slander against a defendant in the Superior Court, and had alleged that the defendant had damaged him in the sum of \$500 00, in publicly charging him with being "an honest man," and a verdict found for the plaintiff, and judgment rendered by the Court thereon, and not excepted to, will it be pretended that such a judgment could not be set aside under the provisions of the Code? Would the Superior Court have had any legal power or jurisdiction, under the law of the land, to have pronounced such a judgment for such a *cause of action*? Would such a judgment, rendered without authority of any law to authorize it, apparent on the face of the record, be binding upon anybody? It would not have been the sentence of the law, for there is no law to authorize the Court to have pronounced such a judgment on the facts set forth in the record, and therefore the judgment would have been simply void for the want of lawful authority to render it for that cause of action.

In order to maintain the validity of the judgment of dismissal now before us, it must necessarily be assumed that the Court below had jurisdiction and authority under *the law of the land* to render it for *the cause* apparent on the face of it; *that assumption* I deny, and maintain the contrary thereof, both upon principle and authority.

As was said by Chief Justice MARSHALL, in *Griffith vs. Frazier*, before cited, the difficulty of distinguishing those cases of administration in which a Court having general jurisdiction may be said to have acted on a subject not within its cognizance, and marking the precise line of distinction, does not prove that no such line exists. This principle of law, as applicable to a judgment, was distinctly recognized and practically enforced by this Court, in the case of *Pierce et al., vs. Pattishall*, decided at the last January term, not yet reported. The true line of distinction, in my judgment, is, that the judgment of a Court of general jurisdiction will always be presumed to have been rendered in accordance with the law

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of the land until excepted to and reversed or set aside; but whenever it *specialy* appears on the face of the judgment that it was rendered for a cause, or on a state of facts not authorized by law, and without any law of the land to authorize the Court, as its organ, to pronounce such a judgment, it is simply a nullity, for the reason that it is apparent that the Court acted on a subject matter not within its lawful *cognizance*; in truth, the subject matter on which the Court acted was not within its lawful jurisdiction, as appears on the face of the judgment; it was a subject matter which the Court had no lawful right to consider and deliberate upon and pronounce a judgment, inasmuch as that subject matter had never been committed to the Court by any law of the land for its consideration and judgment, and this was the ruling of the Court in Griffith vs. Frazier, and of this Court in Pierce vs. Pattishall. It does not follow that because the Superior Court is a Court of general jurisdiction as to the subject matters conferred on it by the law of the land, that it has jurisdiction over any other subject matter not conferred on it by any law of the land. It has no jurisdiction conferred on it by law to consider and adjudge that a bald-headed man's case shall be dismissed from the docket of that Court for *that cause*; neither had it jurisdiction conferred on it by law to consider and adjudge that the plaintiff's case should be dismissed because the consideration of the note sued on was for slaves. These were subject matters which the law of the land has not committed to the cognizance of that Court or any other Court, for its consideration and judgment.

The jurisdiction of Courts is created by law and cannot exist without its authority, and the sole question in this case is, whether it affirmatively appears on the face of the judgment of the Court below, that it was rendered for a cause or subject matter, not confided to its jurisdiction for consideration and judgment by any law of the land, and upon that question there can be no doubt. The Superior Courts in this State can only exercise such powers appertaining to their jurisdictions as may be granted them *by law*: Code, 236, paragraphs 1 and

5; see, also, 4th paragraph of section 3, Article 5, Constitution of 1868.

It is a fundamental principle that no man shall be despoiled or deprived of his property, but by *the law of the land*. That a great wrong has been done to the plaintiff in the dismissal of his case, for the causes apparent on the face of the judgment, must be admitted. Surely this Court should not be *anxious* to perpetuate that wrong by refusing to allow him to set aside that judgment and reinstate his case on the docket where it rightfully belongs. The plaintiff's right to make his motion to have this pretended judgment set aside, which the Court below held was in his way, was not barred by any statute of limitations at the time the motion was made. By the 3530th section of the Code, a motion may be made to set aside a judgment at any time within the statute of limitations, that is to say, at any time within which a judgment can be enforced according to the statute of limitations applicable thereto. Within what time must a judgment be enforced according to the statute of limitations applicable thereto? The 2863d section of the Code answers that question when it declares that no judgment shall be enforced after the expiration of seven years after the time of its rendition, and that applies as well to judgments rendered against a plaintiff, as to judgments rendered against a defendant. The subject matter of legislation in the 3530th section of the Code, is judgments and nothing else, and the statute of limitations mentioned therein has reference alone to judgments, and to no other subject matter; it has no reference whatever to the statute of limitations applicable to promissory notes, or to the statute of limitations applicable to bills of review, or for a new trial in a Court of equity; and there is no statute of limitations that can be made applicable to a motion to set aside a judgment but that specified in the 2863d section of the Code, unless we resort to judicial legislation, which the Constitution of the State prohibits. When the 3530th section of the Code declares that a motion to set aside a judgment may be made at any time within the statute of limitations, the true intent and

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meaning thereof is that the motion to set aside the judgment may be made at any time within which a judgment can be enforced as limited by the 2863d section of the Code. The practical effect of holding that the plaintiff is barred of his right to make the motion to have this pretended judgment set aside and his case reinstated upon the docket, will be to say to him, it is true your case was wrongfully dismissed from the docket of the Superior Court where it was rightfully entered, without the authority of any law of the land, as has been decided by the highest judicial tribunal in the United States, but you shall not have any benefit from, or enjoy any of the fruits of that decision, because you are barred, and this result is accomplished by *judicial legislation*, there being no statute of limitations applicable to this judgment which bars him of his remedy to have this pretended judgment, which the Court below held was in his way, set aside, inasmuch as seven years had not expired from the date of the rendition of this pretended judgment up to the time the motion was made to set it aside. I am, therefore, of the opinion that the judgment of the Court below should be reversed.

HUGH P. ARNOLD, plaintiff in error, vs. A. H. KENDRICK,
administrator, defendant in error.

1. An order of the Judge of the Superior Court, dismissing a suit pending in said Court, is not void because the reason given in the order is not a good legal reason.
2. When a suit was dismissed by an order of the Judge, and it appears that the Judge was mistaken in the fact upon which his judgment of dismissal was based, and the plaintiff made no motion to reinstate, until the second term after the dismissal, and he shows no excuse for his delay in looking after his cause, he is too late to move to reinstate, and especially is this true if he have notice of the dismissal shortly after the order was passed.
3. If a pending suit be dismissed by an order of the Court, and it appears that the ground mentioned in the order is untrue in fact, and a motion to reinstate shows upon its face, that though the reason given was not true, yet that there was in fact a good reason subsisting at the time

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why the case should have been dismissed, there is no error in refusing to reinstate.

WARNER, C. J., dissented.

Practice in the Superior Court. Judgment. Immaterial error. Pleading. Before Judge CLARK. Sumter Superior Court. April Term, 1873.

This case arose upon the issues formed in the following motion:

“SUMTER SUPERIOR COURT,

“October Term, 1872.

“It appearing to the Court that on the 22d day of December, 1869, Hugh P. Arnold, by his attorneys, Hines & Hobbs, filed his action of complaint in this Court returnable to the April Term, 1870, against A. H. Kendrick, administrator of James H. Ravens, deceased, upon a promissory note dated February 20th, 1861, and due March 1st, 1862, for \$2,140 00, payable to H. P. Arnold or bearer, and on which note said James H. Ravens’ name appears as security for one Robert White, principal, and to which action the defendant filed, on April 12th, 1870, his plea of the general issue: that at the October adjourned term, 1871, on the 13th of December, the following order was taken:”

“HUGH P. ARNOLD *vs.* A. H. KENDRICK, administrator.

“It is ordered by the Court that the above suit be dismissed for want of payment of taxes.

(Signed)

“J. M. CLARK,

“Judge S. C. S. W. C.”

“It is, on motion of plaintiff’s counsel, ordered that the said A. H. Kendrick, administrator, show cause on to-morrow morning, or as soon as counsel can be heard, why said order should not be set aside, and said cause be set for trial on its merits at the next term of this Court, on the following grounds:

“1st. That there was an affidavit of taxes paid filed in said cause on April 7th, 1871, and therefore the ground upon which said order was granted was not true.

"2d. That the plaintiff had no notice of the motion to dismiss.

"3d. That the Act requiring the payment of taxes is contrary to the Constitution of the United States and of the State of Georgia.

"4th. That the plaintiff having been ignorant of this order until this term of the Court, the motion to reinstate could not have been sooner made. That the plaintiff's attorneys were present at the October term, 1871, of the Court, with the intention of pressing said case, when N. A. Smith, Esq., of counsel for defendant, made a proposition to settle said case, which they agreed to submit to their client, and did so, and pending these negotiations, without notice to them, this order was taken."

This motion was supported by affidavit of counsel.

The answer of the defendant set up the following facts: The case was called in its regular order. There was no entry of an affidavit of payment of taxes having been filed on the Judge's docket, and there was no proof that taxes had been paid offered, when counsel for defendant took said order, no one objecting. Soon after the dismissal of the cause, counsel for defendant informed one of the counsel for plaintiff of the fact, who replied that he was glad of it, or that it was right, as the plaintiff had refused a fair offer of compromise. This conversation occurred before the last April term of the Court. The proposition to compromise, referred to in said motion, was made as follows:

Before the commencement of said action, or soon thereafter, defendant believes in February, 1870, he being anxious to settle and compromise all claims against the estate, directed his attorney, N. A. Smith, to go to Albany and see plaintiff's attorneys in reference to the note on which suit was commenced. Said attorney requested said Smith to make a written statement of his proposition to compromise, which was done. They subsequently informed him that said proposition had been refused. This occurred long prior to the dismissal

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of said suit. No other terms of compromise were ever offered by the defendant, or by any one authorized by him.

This answer was also supported by affidavit of counsel.

The motion was refused and the movant excepted.

HINES & HOBBS; HAWKINS, GUERRY & HOLLIS, for plaintiff in error.

N. A. SMITH; C. T. GOODE, for defendant.

McCAY, Judge.

At the October adjourned term of Sumter Superior Court, the Judge passed an order dismissing a suit there pending, for reason, as stated in the order "want of payment of taxes." At October term, 1873, the plaintiff moved to reinstate. 1st. On the ground that the order was void. 2d. Because it was based on a mistake of fact, as an affidavit of taxes paid was filed. 3d. The plaintiff's counsel was absent from Court at the time, and did not know of the order dismissing until the present term; and, that at the time of the dismissal, there was an offer of compromise pending, made by the defendant's counsel.

In reply to the motion to show cause, the defendant set up: 1st. That the order was not void. 2d. That there was no pending offer of compromise; that the offer had been made and declined in 1870. 3d. That plaintiff's counsel had express notice of the order in a few weeks after it was taken, and then expressed himself glad of it, as a fair offer of compromise had been refused.

This showing was supported by evidence at the hearing. The Court refused the motion and the plaintiff excepted.

There can be no question as to the jurisdiction of the Court passing this order, both over the parties and the subject matter. The matter was the dismissing of a pending suit, and the party complaining was the plaintiff in this suit. It is admitted that every Court has jurisdiction over the question whether or not a suit pending in the Court shall be dis-

missed. It is admitted that if no reason appeared on the face of the judgment, the order of dismissal would be conclusive after the term. It follows, therefore, that the only reason for setting aside the order is that it appears, on its face, to have been passed by the Judge for a reason not supported by law. In other words, the Court erred in passing the order, and his error was an error of law. By the Constitution of this State, the errors of the Judges of the Superior Courts are to be corrected by the Supreme Court by writ of error. By section 4191 of the Code, either party may except to any decision, sentence or decree of the Judge of the Superior Court, and bring it to this Court for review and correction. And by section 2870, it is provided that "all writs of error must be sued out within thirty days from the adjournment of the Court where the decision complained of was made, or if made at Chambers, from the time of the decision."

There is, and there can be, no dispute, that it was within the jurisdiction of the Judge to dismiss this suit. Indeed, it is admitted that if he had given no reason for his decision on the face of it, and the party complaining had failed to sue out his writ of error in thirty days, he would have been barred. The statute says *all* writs of error shall be sued out within thirty days. What right has any one to say that this only applies to such errors of the Judge as do not appear on the face of his decision? Until a Court has adjourned, all its judgments are open to inquiry; but after it has adjourned, if there be any complaint of *an error of law, committed by the Judge*, this Court and this Court alone, can review and correct it. There is but one exception to this rule, and that is, a motion for a new trial, setting forth extraordinary circumstances to *excuse the delay*. In such cases the Code, sections 3667 and 3670, allows application to be made after the judgment.

Was this order dismissing the plaintiff's suit a decision, sentence or decree of the Superior Court? Would a writ of error have been a proper means to correct it? Is any excuse shown why the party complaining did not move to correct it

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at the term at which it occurred? If these questions must be answered, the first two in the affirmative and the last in the negative, it must follow that the party complaining is barred by his own neglect and *laches*.

The only question *in this case* that presents to my mind any matter for hesitation is, whether or not the present movant has shown an excuse for not moving at the term. It appears that his counsel was absent; but under the proof, the Judge has decided that his absence was without excuse, and I think the evidence supports the Judge's decision. Indeed, the showing of Mr. Hines, on this point, is itself very inconclusive.

As to the mistake of fact by the Judge, in dismissing the case, the same reasons apply. If the plaintiff was absent without excuse, at the term, I doubt if he could move at a subsequent term. But there is proof here that he was informed of the decision and order of the Judge shortly after it was made. Even after this, he gives no reason why he did not look after his case at the next term. He fails to move until the second term after, and is thus not even within the rule which allows one to move for a new trial after the term, on giving extraordinary reasons for his delay in not moving at the term, or even at the next term. It is, therefore, my opinion:

1. That this order was in the jurisdiction of the Court, to hear and pass upon, and that it is not void because it gives as the reason of it, a fact which is not a legal reason.

2. That in the nature of it, it was a decision, judgment, sentence or decree of the Judge of the Superior Court, and, therefore, the subject matter of a bill of exceptions.

3. No motion having been made to alter or correct it during the term, and no good excuse being given for this failure, and no bill of exceptions having been filed within thirty days, as required by law, the party complaining is barred by his own *laches*, and is conclusively presumed, for reasons best known to himself, to have acquiesced in the order.

Judgment affirmed.

TRIPPE, Judge, concurring.

1. Where, at the October term, 1871, a case is called on the docket in its regular order, and plaintiff's counsel is absent and not represented, and the Court dismisses the case, assigning in the order of dismissal as the reason therefor, the non-payment of taxes: Held, that as the case was not prosecuted, and it was the duty of the Court to dispose of it when called for trial, there was a good and sufficient ground for the order, to-wit: for want of prosecution, and it is sufficient to sustain the judgment of dismissal, although not recited in the order.

2. If on the hearing of a motion to reinstate the case, because, amongst other reasons assigned, it was improvidently dismissed, there is evidence sufficient to authorize the Court, in the exercise of its discretion, to hold to the contrary, and that in addition to the absence of plaintiff's counsel, without leave of the Court, when the case was called, there is testimony that counsel for plaintiff was notified of the dismissal in two weeks afterwards, expressed satisfaction that it was done, and no steps were taken to reinstate for more than a year, it was no abuse of the discretion of the Court in refusing the motion.

WARNER, Chief Justice, dissenting.

On the 22d day of December, 1869, the plaintiff instituted his suit in the Superior Court of Sumter county against the defendant on a promissory note, dated in 1861, for the sum of \$2,140 00.

At an adjourned term of the Court, in December, 1871, it was "ordered and adjudged by the Court that the said suit be dismissed for want of payment of taxes."

At the October term of the Court, 1872, the plaintiff made a motion to set aside this pretended judgment of dismissal, and to have his case reinstated on the docket of the Court; in other words, he made a motion to reinstate his case upon the docket of the Court, treating the pretended judgment of dis-

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missal of the case for *the cause apparent on the face of it*, as a nullity. This motion was refused, and the plaintiff excepted.

It is not pretended that the plaintiff's debt was barred by the statute of limitations applicable to promissory notes, at the time of the commencement of the suit. But for this pretended judgment of dismissal for the non-payment of taxes, as the sole ground therefor, the plaintiff would have been entitled to have collected his debt from the defendant, unless he had a valid, legal defense thereto, independent of the statute of limitations. What is it then that prevents the plaintiff from prosecuting his suit in the Court in which it was rightfully instituted in time, in accordance with the laws of the land? It is this pretended judgment of dismissal before recited, this nullity which the Court below *galvanizes* into a valid, subsisting legal judgment that took his case off of the docket of the Court, and now keeps it off, and nothing else. If the Court below had not galvanized this pretended judgment, this nullity, into a valid, subsisting judgment, and made it operative as such to take the plaintiff's case off the docket of the Court, and as standing in his way now to keep it off, there would have been no necessity for the plaintiff to have made a motion to set it aside and get it out of his way. The plain fact is, that if this pretended judgment, this nullity which the Court below, by some process unknown to the law, galvanizes into a valid legal judgment, and then makes it stand in the plaintiff's way, by refusing to set it aside out of his way, and so long as this galvanized nullity in the form of a judgment shall be allowed to remain and have the effect of a valid judgment, as it was held to be by the Court below, the plaintiff is remediless. It is this pretended *galvanized nullity*, this void judgment which hurts the plaintiff and keeps his case off the docket of the Court, and, in my judgment, he has the right, under the provisions of the Code, to make a motion to have it set aside and removed out of his way at any time within seven years from the date of its rendition, for the reasons expressed in my dissenting opinion in *Tison vs. McAfee*.

It is not a good reply to the plaintiff's motion to set aside this pretended void judgment out his way and to have his case re-instated, that the note on which the suit was instituted in December, 1869, is *now* barred by the statute of limitations; it was not barred when the plaintiff's suit was commenced thereon, which was dismissed out of Court by this pretended void judgment, and the plaintiff's rights in respect to the statute of limitations running against the note, are to be viewed and considered, just as the same existed when his case was dismissed out of Court by this pretended void judgment, and not as the same existed at the time the motion was made.

The plaintiff's suit was commenced in time under the provisions of the Limitation Act of 1869, and it is not his fault that it is not now pending on the docket of the Court where it was rightfully entered in accordance with the law of the land, and where it would have remained until a final trial, but for this pretended void judgment by which it was dismissed therefrom, and which now keeps it off of the docket by being galvanized by the Court below into a living, effective judgment for that purpose, and thus deprives the plaintiff of his plain legal rights. The only question is whether it was error in the Court below in recognizing this void judgment dismissing the plaintiff's case, for the causes apparent on the face of it, as a valid subsisting judgment standing in the plaintiff's way of having his case reinstated, or whether it should have been treated as a nullity by the Court, and the plaintiff's case reinstated on the docket where, by law, it was rightfully entered for a hearing and trial.

In my judgment, the Court below should have granted the plaintiff's motion to reinstate the case, on the ground that the order and judgment of the Court, made at the December term, 1871, dismissing it for want of payment of taxes, was null and void, and if, in the opinion of the Court below, that pretended judgment stood in the plaintiff's way of having his case reinstated, then it should have granted an order to set it aside, and that the plaintiff was not barred of his right to make the motion at the time he did, by any statute of limi-

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tations of this State applicable thereto, or by any want of diligence on his part, in view of the facts disclosed in the record.

I am, therefore, of the opinion that the judgment of the Court below should be reversed.

JOHN F. LOUDEN, assignee, plaintiff in error, vs. JOHN KING, defendant in error.

When a defendant in an attachment is adjudged a bankrupt within four months after the issuing of the attachment, and the assignee comes in the Court where the attachment is pending and makes it known that the defendant has been so adjudged a bankrupt, and moves to have the attachment declared dissolved :

Held, That the Court ought to grant the motion, and that it was not necessary for the assignee to make himself a formal party to the attachment before moving to have it declared dissolved.

Bankrupt. Attachment. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

On the 5th April, 1872, John King attached the cotton presses, castings and other property of the Empire Cotton Seed Huller and Oil Company, on the ground "that said defendant was causing its property to be removed beyond the limits of the State," for \$2,307 53. At the November term, 1872, of Muscogee Superior Court, John F. Louden made the following motion in writing: "And now comes John F. Louden, assignee in bankruptcy of the Empire Cotton Seed Huller and Oil Company, an incorporation of the State of New York, and makes profert of his letters of appointment as assignee of said defendant by the District Court of the United States for the Southern District of New York, and shows that the said Empire Cotton Seed Huller and Oil Company was declared bankrupt under the Act of Congress, passed March 2d, 1867, on the 2d July, 1872; that said attachment was sued out on the 5th April, 1872, being within four months of the 2d July, 1872; and moves the dissolution of said attachment."

In support of the motion he submitted the proceedings of the District Court of the United States Court for the Southern District of the State of New York, showing the appointment of John F. Loudon as assignee, with conveyance of property of the bankrupt. The Court refused to dissolve the attachment, to which refusal the assignee excepted. He further moved the Court to enter on the minutes that said motion was refused. This the Court refused to permit, and he excepted.

Error is assigned upon each of the aforesaid grounds of exception.

R. J. MOSES, for plaintiff in error.

HENRY L. BENNING ; PEABODY & BRANNON, for defendant.

McCAY, Judge.

We think the order ought to have been granted. The bankrupt law is just as much the law of the land as the attachment law, and the bankrupt Court is as completely a part of the machinery of our system of jurisprudence as is the Superior Court. There can be no question, therefore, that, under the facts as presented by the movant, this attachment was dissolved by the adjudication of bankruptcy. When the fact of the adjudication was made known to the Court, by proper proof by the assignee, it was the duty of the Court to recognize the facts by an order declaring the attachment dissolved. And this for two reasons—one, because the assignee is entitled to have the attachment out of his way; and the other, that the records of the State Court may show what has become of the attachment, and why it has not proceeded.

We think the movant was as much a party to the proceeding as was necessary for the purposes of his motion. The defendant in attachment is not served. The case is only in Court by virtue of the levy or garnishment, and when that is dissolved there is no party. In the case of *Kent vs. Downing*,

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44 *Georgia*, 116, the assignee *sought* to be a party. He desired to have the attachment dismissed, not declared dissolved. Any rights of the officers of Courts for costs or of the attorneys for bringing the fund into Court, are still a lien on the money. These rights attach to the fund. We do not decide what they are, nor is there anything in the order declaring the attachment dissolved which affects them. The money is still in the hands of the Court, burdened with whatever legal liens there may be upon it, arising out of proceedings lawfully had in the cases under which it came into the custody of the Court. Whether those liens shall be adjusted and satisfied before the money is turned over, or whether it belongs to the bankrupt Court to settle them as it does other liens, is not now a question, though we see no good reason now why the Court having the fund should not settle this before it turns it over.

Judgment reversed.

ARNOLD & DUBOSE, plaintiffs in error, vs. GEORGIA RAILROAD AND BANKING COMPANY, defendant in error.

1. An action against a railroad company to recover the excess of a payment for freight beyond what is allowed to be charged by the charter of the company, may be brought under the Act of March 4, 1869, in the county from which the articles were shipped, that being the place where the contract for shipment was made, although the payment was made in another county.
2. The Georgia Railroad and Banking Company, under the 12th section of its charter, can only charge for freight fifty cents per one hundred pounds, on heavy articles, for one hundred miles, and in proportion to that rate for a less distance than one hundred miles.
3. If payment beyond the rate specified in the charter be made voluntarily by the shipper, through mere ignorance of the law, or paid "where the facts are all known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party," an action will not lie to recover it back.

Railroads. Venue. Charter. Freight. Contracts. Before Judge ANDREWS. Wilkes Superior Court. May Term, 1873.

Arnold & DuBose vs. The Georgia Railroad and Banking Company.

Arnold & DuBose brought complaint against the Georgia Railroad and Banking Company for \$2,362.50, overcharge in freight on three million one hundred and fifty thousand pounds of cotton, shipped on the cars of the defendant for a distance of seventy-five miles. The defendant pleaded the general issue and to the jurisdiction of Wilkes Superior Court.

The evidence made the following case: The amount of cotton was shipped, as alleged, at Washington, Wilkes county, to be conveyed by the defendant to Augusta, Richmond county, a distance of seventy-five miles. The freight charged by the defendant was forty-five cents per hundred pounds. The freight had been paid in Augusta. The agent of defendant at Washington had no instructions to receive freight or to refuse it. Had it been offered he would have received it. The former charge was thirty-three cents per one hundred pounds; from the year 1865 to the present time, during which period plaintiff's cotton was shipped, the charge has been at the rate of forty-five cents per one hundred pounds. The charge by wagon, before the railroad was built, was fifty cents per hundred pounds. The plaintiffs, before the commencement of suit, demanded from the defendants seven and one-half cents on each one hundred pounds of cotton shipped, as being an overcharge and illegal, under its charter. Payment was refused.

It was agreed that the case should go to the jury on both pleas, subject to the charge of the Court.

The Court charged that under the facts proved, the Superior Court of Wilkes county had no jurisdiction of the case; that if said Court did have jurisdiction, there was nothing in the charter of the defendant prohibiting the charges of freight as made.

The jury returned a verdict for the defendant.

The plaintiffs except to the aforesaid charge of the Court, both as to jurisdiction and as to the construction of the charter of the defendant.

R. TOOMBS, for plaintiffs in error.

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W. M. & M. P. REESE; W. H. HULL; E. H. POTTLE;
HILLYER & BROTHER, for defendant.

TRIPPE, Judge.

1. Section 3329 of the Revised Code, as amended by the Act of March 4th, 1869, is as follows: "All railroad companies shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents or employees, for the purpose of recovering damages for such injury, and also on all contracts *made or* to be performed in the county where the suit is brought." New Code, section 3329. The section, before it was amended by the Act of 1869, has, after the word "employees," the following words, "in or by the running of the cars." These words were stricken out by the Act of 1869, and also the words, "*made or*" were inserted by that Act. Previous to its passage no action could be brought for damages in the county where the damage occurred, unless it was caused "by the running of the cars," and no action on a contract unless the contract was to *be performed* in the county where suit was brought. Of course this statement has no reference to the right of every plaintiff to sue the company in the county where its chief office of business is located. Before the statutory change to the venue of suits against railroads, the action was forced to be brought in the county where that office was. The Legislature, seeing the burden that this rule imposed on the citizen, compelling him to go fifty or one hundred or two hundred miles to assert his claim, commenced, many years ago, to give further rights to plaintiffs in such cases. Several Acts have been passed, and at last it was enacted that the action might be brought where the injury was done by the running of the cars, or where the contract was to be performed. To add still farther to the facilities of claimants living on a long line of road, and doubtless to cover, as nearly as possible, all cases of that sort, the Act of 1869, by striking out the words, "in and by the run-

ning of the cars," intended to include all kinds of injury to person and property done by railroad companies, their agents, officers or employees, and by adding the words, "or made," to give a right of action on all contracts, where they were made or were to be performed. In thus looking at these efforts on the part of the Legislature, we do not think, at least a majority of this Court do not, that it would be within the spirit and meaning of the Act of 1869 to hold in such cases as this, and, in fact, in all cases founded on or growing out of the contract and resting directly upon the contract, that the action could not be brought where such contract was made. We think the true intent and meaning of the Act of 1869, when construed in the light of the old law, the mischief and the remedy, would sustain this action in the county of Wilkes, in so far as the question of jurisdiction is involved.

2. The next question is, whether the following words in the charter of the Georgia Railroad, to-wit: "that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles," impose a *pro rata* limitation on distances less than one hundred miles. For myself, I do not hesitate to state that this question is one of some difficulty, though a majority of the Court have no hesitancy on their minds. The argument on this point was able and ingenious, but it is unnecessary to review it here. There are two other provisions in the same section, making direct reference to the one quoted, which determines the matter, at least so far as to justify the decision pronounced. The first of these is, "that the said company may, when they see fit, rent or farm out all, or *any part*, of their said exclusive right of transportation or conveyance of persons on the railroad, or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, *subject to the rates above mentioned.*" Now, it is pertinent to remark that the charter granted the right to build branch railroads to points less than one hundred miles distant, and that these branches could

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not be of that length. If the rates that had been prescribed were not intended to be proportionately applied to distances under one hundred miles, how could the lease of a *branch road*, or *part of the road* of a less length than *one hundred miles*, be "subject to the rates above mentioned?" If those rates were intended to govern the lessees, as to distances less than one hundred miles, it could only be by apportioning the rates to the distance; and if the lessees were to be thus controlled by such an apportionment, it was because the charter intended to apply them to the whole road. The second provision referred to is, "it shall be lawful for the said company to use or employ any section of their intended railroad, *subject to the rates before mentioned*, before the whole shall be completed, and in any part thereof which may afford accommodation for the conveyance of persons, merchandize or produce." The same remark is appropriate to this which was made in reference to the provision about leasing. Each implies that less than one hundred miles of the road might be used, more or less permanently; but if it was, the owner or the lessee, as the case might be, should be subject to the rate of fifty cents per hundred pounds for one hundred miles. And this could not be, unless a certain proportion of that rate was taken for a corresponding proportion of that distance.

3. The defendant further insists, that even if the amount charged and paid by plaintiffs was beyond the charter rates, yet it was paid voluntarily by them, and that there was no artifice, fraud, or deception on the part of defendant. This presents the question whether money, paid voluntarily by one party to another, with knowledge of all the facts, can be recovered back, on the ground that the party receiving the money could not have enforced payment by law. No one will deny that if the party so paying, did so with knowledge, that it could not have been collected by legal process, he cannot recover it back. Money paid for a gaming debt is an exception, by special statute. Usury paid is another exception; but that not to the extent to which the party paying could have, by law, prevented its collection. He could, by setting

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up the defense of usury, defeat the collection of all but the original principal. If he voluntarily pay principal and usury, he could only recover back the excess of the usury over the legal interest. I speak of the law as it formerly stood; and even when, by statute, the whole contract was void on account of usury, still if the debtor paid the whole, he could reclaim nothing but what was over the lawful interest. The authorities to the effect that money paid voluntarily, without mistake of fact, though in ignorance of the law, cannot be recovered back, are numerous and almost without exception. In *Culbreath vs. Culbreath*, 7 Georgia, 64, in an elaborate decision, showing that there might be a recovery where it was paid under a *mistake* of law, the principle is yet admitted that if it be from *ignorance* of law, there can be no recovery. And the great effort in that case is to set up and show that there is a difference between *ignorance* and *mistake* of the law. This principle has been, to a certain extent, embodied in the Code: See sections 3121 to 3126, inclusive, new Code; section 3121 is, "mere ignorance of the law on the part of the party himself, where the facts are all known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party, either to induce the mistake of law, or to prevent its correction, will not authorize the intervention of equity." Section 2636 provides, "mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale. Mistake of a material fact may, in some cases, justify a rescision of the contract, mere ignorance of a fact will not." A strong writer has said, that to allow the doctrine that ignorance of law is a ground of defense, would overturn the foundations of every system of jurisprudence. Bateman on Commercial Law, 26; and Judge Story says: "As every man is presumed to know the law, and to act upon the rights which it confers, when he knows the facts, it is culpable negligence in him to do an act or make a contract, and then set up his ignorance as a defense: 1 Story's Equity, section 140. A few of the numerous cases determining the principle involved in this case are simply referred to:

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12 East, 38; 2 *Ibid.*, 469; 5 Taunt, 144; 8 Wheaton, 215; 2 John. Ch., 51; 9 Cowen, 674; 1 Wend., 355; 10 Peters, 138.

It is true that in some of those cases no distinction is taken between *ignorance* and *mistake* of law. They seem to be held as equivalent terms, and the right to relief is denied in either instance. Others of them draw a distinction, as did this Court in *Culbreath vs. Culbreath*, *supra*, and maintain the right to relief where there has been a *mistake* of law. In the case under consideration the plaintiffs were paying the money sued for during the years 1868 to 1872, inclusive. They now set up that the defendant had no right by law to make the charges which they paid; in other words, that the defendant charged and they paid more than the defendant was, by its charter, allowed to charge. Why, then, did they pay it? If voluntarily, or by agreement, knowing the law, no one can say they are entitled to recover it back. If voluntarily, but in ignorance of the law, we have seen that it is not sufficient, neither under the principles contained in the Code, or under the decisions referred to. If there was any fraud, artifice or deception practiced by defendant, it should have been shown. Under this great weight of authority, both statutory and judicial, it may well be said, as was said by the Judges pronouncing the opinion of the Supreme Court of New York, in *Clarke vs. Dutcher*: "Although there are a few *dicta* of eminent Judges to the contrary, I consider the current and weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of the law; and it shall be considered a voluntary payment:" 9 Cowen, 681. This, then, being the law of this case, although the Court below erred on the question of jurisdiction, we are constrained to affirm the general judgment, as the verdict must necessarily, under the evidence, have been what it was, and this is in accordance with

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numerous decisions of this Court: 41 *Georgia*, 16 ; 42 *Georgia*, 244.

Judgment affirmed.

McCAY, Judge, concurring.

I concur, except on the point of jurisdiction of the Superior Court of Wilkes county. As the cause of action was not on the contract, but on the implied assumpsit arising on the payment of the money to repay it, and as the money was paid, in fact, in Richmond county, the suit, if a good suit, should have been in Richmond county.

ZACHARIAH H. SHEPPARD, plaintiff in error, vs. MILES WHITFIELD, executor, defendant in error.

50	313
114	28

When a suit pending in the Superior Court was dismissed by order of the Court at March term, 1869, of the Court, and there is nothing on the face of the order to show the ground of its dismissal, it is too late at June term, 1872, to move to have the case reinstated on the ground shown by parol, that the order of dismissal was because the suit was for a slave debt.

50	311
128	403

Practice in the Superior Court. Judgment. Before Judge TWIGGS. Washington Superior Court. June Adjourned Term, 1872.

Sheppard brought complaint against Whitfield as the executor of Robert Whitfield, deceased, for \$500 00, alleged to be due for the hire of a slave. At the April term, 1869, of the Court, when the case was called, defendant's counsel moved to dismiss the same on the ground that it was a suit for the recovery of the hire of a slave, of which the Court could not take jurisdiction under the provisions of the Constitution of 1868. The motion was sustained.

The record and bill of exceptions fail to disclose the judgment of the Court. It is merely stated, in general terms, that the motion was sustained and the case dismissed.

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At the June adjourned term, 1872, counsel for plaintiff moved to reinstate said cause upon the following grounds, to-wit:

1st. Because the Court erred in entertaining a motion to dismiss said cause under the provisions of the Constitution of 1868.

2d. Because the provision of the Constitution of 1868, which prohibits the Courts from taking jurisdiction of debts for the sale or hire of slaves is null and void, being obnoxious to the 10th section of the 1st Article of the Constitution of the United States.

3d. Because there existed no legal ground for dismissing said cause.

The motion was overruled and the plaintiff excepted.

LANGMADE & EVANS, by brief, for plaintiff in error.

No appearance for defendant.

MCCAY, Judge.

Whilst the question in this case is settled by the decision in the case of *Tison vs. McAfee*, decided at this term, yet, as there is a material difference between this case and those cases in one particular, and as that difference makes this a case on which we all agree, we prefer to put the case on a ground dependent upon that difference. In the case referred to the judgment of the Court, dismissing the suit, was, upon its face, based solely on the ground that the consideration of the debt sued was slaves; the judgment in this case is a general one. No reason is stated for dismissing the case. The Chief Justice dissented in the former cases on the sole ground that upon the face of the record it appeared that the Court had done an act beyond its power, and, therefore, beyond its jurisdiction; an act void upon its face. No such thing appears here. The case, as appears by the record, was dismissed. So far as the record shows, this may have been for a good reason—one entirely proper. True, it is made to appear by parol that the

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real reason was not a good one. But, even in the view of the Chief Justice, as stated by him so emphatically in the two cases alluded to, it is not competent to attack a judgment apparently good, by a parol showing that the reason for it was one that did not exist in law. If the dismissal was error, the losing party should have excepted at the time, procured a certificate of the Judge, in due form, to the truth of the case and sought his remedy by writ of error to this Court.

Judgment affirmed.

HENRY O. HOYT, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. An indictment charging a defendant with having received a certain amount of money to be applied for the use or benefit of the bailor, with an allegation that on a certain day the defendant fraudulently converted a specific portion thereof to his own use, is not demurrable on the ground of its being general, vague and indefinite, and that it does not put the accused on notice of what he is called on to answer. It might be that the proof would clearly and definitely show the fraudulent conversion as charged. But under such an indictment, making the general charge of fraudulent conversion, as stated, evidence is not admissible to prove that the accused had reported to the bailor, special payments as having been made to particular persons, and that such payments were not, in fact, made to the amounts so reported, or that there were no such persons as those to whom the payments were reported to have been made. Each of such fraudulent acts would be a crime, and proof thereof would be sufficient to sustain a conviction, and the indictment should contain specific charges of such acts to authorize the admission of evidence showing they had been committed.
2. Where a defendant is charged with having received money belonging to the State of Georgia to be applied for the use of the Western and Atlantic Railroad in paying for cross-ties, and that he fraudulently converted a portion thereof to his own use, and the defendant files thereto as a special plea in bar, his plea alleging that after said money had been so received by him, a board of commissioners had been appointed under an Act of the Legislature to audit and approve any claim against said road, and that he having a large claim against said road submitted the same to said commissioners; that upon a hearing thereof the money alleged in the indictment as having been received by him was

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charged up against him by said commissioners, and on a full accounting before said board, a balance was allowed him; and that he then and there fully accounted with said board for all the money set out in the indictment as having been received by him:

Held, That the plea was not a special plea in bar against such an indictment; that, under the Act of the Legislature referred to, the board of commissioners did not have authority to discharge any person from liability for a criminal act. The facts set out in the plea would be admissible under a plea of not guilty, and under that plea it would be competent for the defendant to show that he did, in fact, fully and fairly settle for such money with said board, and that the State received the benefit thereof by its being deducted from a claim due him by said board.

3. No officer of the State, or of the Western and Atlantic Railroad, by entrusting another with money belonging to the State, can make such person a bailee or fiduciary of the State, and thereby constitute the State the bailor or person so entrusting, etc., within the intent and meaning of sections 4356 and 4358 of the Revised Code. In such a case the person so receiving the money, if he be a private citizen and withholds the same after demand, can only be indicted under the Act of December 14, 1871, and if he be an officer, servant or person employed in any public department, station or office of Government of this State, and embezzles, secretes or steals said money, he may be indicted under section 4558 of the Code.
4. The indictment is not sufficient under the Act of December 14, 1871, because it does not charge the defendant with fraudulently, wrongfully or illegally receiving the money, nor does it charge him with having lawfully received the same and with failing to pay within ten days after a demand, and the indictment was, in fact, found within five days after the demand is alleged to have been made.
5. Nor is the indictment sufficient under section 4355 of the Code, as it does not charge the defendant to be an officer, servant or person employed in any public department, station or office of Government in this State, etc., as prescribed in said action.

Criminal law. Embezzlement. State. Western and Atlantic Railroad. Indictment. Before Judge HOPKINS. Fulton Superior Court. April Term, 1872.

Hoyt was arraigned on the following indictment:

“STATE OF GEORGIA—FULTON COUNTY:

“The grand jurors selected, chosen and sworn for the county of Fulton, to-wit: * * * * In the name and behalf of the citizens of Georgia, charge and accuse Henry O. Hoyt,

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of the county and State aforesaid, with the offense of fraudulently converting money to his own use without the consent of the owner or bailor, and to the injury of such owner, and without paying to such owner or bailor on demand, the full value or market price thereof, he being a bailee thereof, and entrusted therewith. For that, heretofore, in said county, he, the said Henry O. Hoyt, did receive the aggregate sum of \$30,029 85 belonging to the State of Georgia, from Isaac P. Harris, treasurer of the Western and Atlantic Railroad, acting for and in behalf of the State of Georgia, the said aggregate sum being received in parcels at different times during the year 1870, as follows: February 8th, \$1,232 00; March 10th, \$2,999 90; April 12th, \$2,576 60; May 11th, \$1,235 10; August 18th, \$13,698 65; November 1st, \$9,113 20; December 1st, \$80 00—the whole of said aggregate sum of money and each and all its parts, being received by the said Henry O. Hoyt, and entrusted to him for the purpose of paying for cross-ties for the use of the said Western and Atlantic Railroad, and a part of said aggregate sum of money, to-wit: the sum of \$20,000 00, he, the said Henry O. Hoyt, did, on the 11th day of May, in the year 1872, in said county, fraudulently convert to his own use, without the consent of the State of Georgia, the owner and bailor thereof, and to the injury of the said State of Georgia, and refuse to pay the said State of Georgia the said sum of money or any part thereof, when demand for the same was made, as such demand was in point of fact made on the 11th day of May, in the year 1872, by Alton Angier, as the legally authorized agent of Needom L. Angier, as treasurer of said State, and refuse to pay any part or portion thereof, contrary to the laws of said State, the good order, peace and dignity thereof.

“And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Henry O. Hoyt with having committed the offense aforesaid: for, that heretofore, in said county, he, the said Henry O. Hoyt, did receive the sum of \$30,029 85, belonging to the State of Georgia, from Isaac P. Harris, treasurer of the Western and

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Atlantic Railroad, acting for and in behalf of the State of Georgia, the said aggregate sum being received in parcels at different times during the year 1870, as follows: February 8th, \$1,232 00; March 10th, \$2,999 90; April 12th, \$2,576 60; May 11th, \$1,235 10; August 18th, \$13,698 65; November 1st, \$9,113 20; December 1st, \$80 40—the whole of said aggregate sum of money, and each and all its parts, being received by the said Henry O. Hoyt, and entrusted to him for the purpose of paying for cross-ties for the use of said Western and Atlantic Railroad, and a part of said aggregate sum of money, to-wit: the sum of \$141 35, the said Henry O. Hoyt did, on the 11th day of May, in the year 1872, in said county, fraudulently convert to his own use, without the consent of the State of Georgia, the owner and bailor thereof, and to the injury of the said State of Georgia, and refuse to pay the said State of Georgia the said sum of money or any part thereof when demand for the same was made, as such demand was in point of fact made on the 11th day of May, 1872, by Alton Angier, as the legally authorized agent of Needom L. Angier, the treasurer of said State, and refuse to pay any part or portion thereof, contrary to the laws of said State, the good order, peace and dignity thereof.

“April Term, 1872.

(Signed)

“JOHN T. GLENN,

“Solicitor General.

“W. L. GOLDSMITH, Prosecutor.”

The defendant demurred to said indictment upon the following grounds, to-wit:

1st. Said indictment is insufficient, in that it charges the defendant with the offense of “fraudulently converting money to his own use without the consent of the owner or bailor, and to the injury of such owner, and without paying to such owner or bailor, on demand, the full value or market price thereof.”

2d. It does not charge the defendant with having fraudulently converted money to his own use, without the consent

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of the owner and bailor, and to the injury of such owner, and without paying to such owner and bailor the full value or market price thereof.

3d. It contains two counts insufficiently stated in this, that the first count does not sufficiently charge any specific offense, and the second count refers to the offense set out in the first count, as the offense aforesaid.

4th. Said second count in said indictment is insufficient in law, in this, that it does not charge any offense against this defendant.

5th. The indictment does not charge with sufficient certainty any offense known to the laws of Georgia.

6th. It does not allege with sufficient certainty that the said Hoyt was entrusted with any money or other thing of value, belonging to the said State of Georgia, or any other person.

7th. It does not state with sufficient certainty that said Hoyt was entrusted with any money or other thing of value as the property of the State of Georgia by any person or officer having power or authority under the laws of said State of Georgia to so entrust money to said Hoyt.

8th. It does not charge that said money was entrusted to said Hoyt, or deposited with him as the property of the State of Georgia.

9th. There is no offense as charged in said indictment known to the laws of said State, as the statute under which said indictment is founded does not contemplate the conversion of money belonging to the State by any officer or servant of the State.

10th. It does not allege that the said defendant failed to purchase cross-ties for which said money was so entrusted to him for the purpose of purchasing.

The demurrer was overruled, and the defendant excepted.

The defendant pleaded as follows: "And now, at this term of the Court, comes the defendant, in his own proper person, and for plea in bar of any further or other proceedings under said indictment, saith, that he ought not to be held to

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a further answer to the charge contained in the same, for that heretofore, to-wit: on the 24th day of October, in the year 1870, the General Assembly of this State, at its regular session, passed an Act entitled "An Act to authorize the lease of the Western and Atlantic Railroad, and for other purposes therein mentioned," which Act received the assent of the Governor on the day and year last aforesaid, which then and there became a law of the land, and said Act then and there created a board of commissioners, consisting of Benjamin Conley, Dawson A. Walker, and George Hillyer, Esqrs., to whom was referred the auditing, investigation and passing upon all debts, liabilities and claims pertaining to the affairs of the Western and Atlantic Railroad, and giving them full jurisdiction of said affairs, and authorizing the Governor to draw his warrant on the treasury for any amount which should be found due against said Western and Atlantic Railroad.

"And now, this defendant avers that all the amounts of money claimed to be due to the State of Georgia in said bill of indictment, and all the transactions of this defendant during the time of his connection with the Western and Atlantic Railroad, were submitted to said commissioners above stated this defendant having a large unliquidated claim against the State of Georgia, all of which had not, at that time, been settled up, but being, in a large part, paid, the same was then and there submitted to said board for the adjudication and settlement of the same; that the specific charges made in said indictment were all considered by said auditing committee, and the settlement between this defendant and the State of Georgia fully and fairly made in accordance with the provisions of the Act aforesaid. And this, this defendant is ready to verify. Wherefore he prays judgment of the Court and puts himself upon the country.

"And for further plea, this defendant says, that before the demand alleged to have been made by the agent of the treasurer of this State, as set forth in said indictment, and after the said Benjamin Conley, George Hillyer and Dawson A. Walker, Esqrs., as commissioners, had duly qualified and en-

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tered upon the discharge of their duties, this defendant, having a large unliquidated demand against the Western and Atlantic Railroad, on account of cross-ties, wood, and other claims, this defendant went and appeared before said commissioners, duly appointed for that purpose, and upon a solemn and deliberate examination of his accounts for money received by him, payments made by him, on account of said Western and Atlantic Railroad, into which said examination and hearing the said several sums of money stated and charged in said indictment went, and were heard and were passed upon and charged up against this defendant by said commissioners, and after a full accounting, this defendant was allowed a considerable balance, and so this defendant avers, that before said commissioners, duly appointed, and upon a full hearing, this defendant then and there fully accounted to and with said Western and Atlantic Railroad for all the money charged to have been placed in his hands, and alleged against him in said indictment; all of which this defendant is ready to verify. Whereof he prays judgment of the Court, that the said indictment may be quashed, and puts himself upon the country."

On motion of the Solicitor General, the plea aforesaid was stricken. To which ruling the defendant excepted, upon the ground that said plea tendered an issuable fact which should have been submitted to a jury.

The defendant pleaded not guilty.

After the first witness for the State was sworn, and when he was about to be examined, the defendant objected to any evidence being admitted under said indictment, upon substantially the same grounds as were taken in the demurrer aforesaid. The objection was overruled, and the defendant excepted.

John C. Aycock, William L. Headrick and Thomas L. Horne, were introduced as witnesses for the State, for the purpose of testifying as to cross-ties furnished by them for the Western and Atlantic Railroad, and payments made to them therefor by the defendant, showing the difference between the amounts actually paid to them and the amounts as claimed to

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have been paid by the defendant, as appear from the entries made in his wood and cross-tie book.

This evidence was objected to by the defendant upon the following grounds, to-wit:

1st. Because it was offered to impeach the testimony offered by the State, to-wit: the book introduced as to the amount of cross-ties and wood bought by said defendant.

2d. Because the indictment did not allege any fraudulent conversion of money entrusted to said defendant to pay for cross-ties and wood purchased from either of said witnesses.

3d. Because the defendant was not put on notice by said indictment of the fraudulent conversion of any money entrusted to his care to be paid to said witnesses.

The objections were overruled, and the defendant excepted.

The cross-tie and wood books kept by said defendant, introduced by the State, showed payments made to O. Nichols, S. Haney and M. Horne. The Solicitor General proposed to ask the three witnesses aforesaid if they knew any persons of said names on the line of the Western and Atlantic Railroad? The defendant objected to this question upon the following grounds, to-wit:

1st. Because said question was irrelevant to the issue before the jury.

2d. Because the defendant was not put on notice that he was to answer for the conversion of money entrusted to him for either of the parties aforesaid.

3d. Because, in effect, the defendant was called upon, in the admission of evidence of this character, to prove himself innocent of the charge made against him in said indictment, without knowing before trial what charge he had to meet.

4th. Because if there did not exist any such men as were referred to in said books, defendant was guilty of another offense than the one charged, and could not be called upon to answer more than one offense in the same indictment.

The evidence being voluminous and unnecessary to an understanding of the decision is omitted.

The jury found the defendant guilty, and recommended

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him to the mercy of the Court. The defendant moved for a new trial upon each of the aforesaid grounds of exception.

The motion was overruled, and the defendant excepted.

GARTRELL & STEPHENS; PEEPLES & HOWELL; A. B. CULBERSON; D. P. HILL, for plaintiff in error.

JOHN T. GLENN, Solicitor General; HILL & CANDLER, for the State.

TRIPPE, Judge.

1. It is not necessary to notice all the different points made in the demurrer to the indictment. What we do pass upon are sufficient to dispose of all practical questions in the case. The indictment is not demurrable as being vague and indefinite, in that it does not put the accused on notice of what he is called on to answer. It charges him with having received a certain amount of money to be applied for the use or benefit of the bailor, and that on a certain day he fraudulently converted a specific portion thereof to his own use, without the consent of the owner, and to his injury, etc.. These are almost the exact words of the statute, and that the indictment is not vague or uncertain, may be illustrated by one suggestion. Suppose, on the trial under such an indictment, the proof was, that the sum charged as being fraudulently converted, was not only not in fact used, as by the terms of the bailment it was to be used, for the benefit of the bailor, but, by the confession of the accused, was converted by him as charged, and that he, on account of such offense, was endeavoring to flee. Would not this proof sustain the charge, and would it not be competent evidence under the charge? Could the accused complain that he was not put on notice of what he was charged with? But, under an indictment making a general charge of fraudulent conversion, as stated, we do not think it competent for the prosecution to prove that the accused had reported to the bailor special payments as having been made to particular persons in the performance of his duty

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as bailee, and that such payments were not, in fact, made to the amounts so reported ; or, that there were no such persons as those to whom the payments were reported to have been made. Each of such fraudulent acts would be a crime, and proof thereof would be sufficient to sustain a conviction, and the defendant should be put upon notice of such charge. Unless this be the rule, no bailee could ever have anything like a fair opportunity either to defend or explain. Take, for instance, such a case as this. A person invests another with a trust, giving him money to pay his debts, not specifying who the creditors are, or to expend the money for certain general purposes for the benefit of the bailor. The bailee proceeds to discharge his duty, and makes his report, showing a full discharge of what was in his hands. He is indicted generally as fraudulently converting, on a certain day, the whole, or one-half the amount entrusted to him. He may have made and reported payments to fifty or one hundred persons. On the trial, two or three of those he reported as having received payments from him, are offered as witnesses to prove that he did not pay them the amounts reported ; or it is proposed to prove that two or three of such reported persons are fictitious names, that the witnesses do not know such persons. No charge of fraudulent conversion has been made as to such payments, or as to there being no such persons. The defendant is suddenly confronted with the proposition of such proof, without notice or preparation for defense as to acts, each of which constitutes a crime, and proof of either being sufficient to sustain a conviction on an indictment founded thereon. He might, with proper notice be fully prepared to prove the identity and real existence of the persons, whom other witness are ready to swear they do not know, for fifty men may truly swear they do not know certain persons, and they do not believe they exist, whilst many others would satisfactorily prove that there were such. Surely the opportunity should be afforded a defendant to do this in such a case, by the charge being so framed as to give proper notice of the offense in-

tended to be proved. Unless this were so, the greatest injustice might and would be often done.

If the State be aware of such acts, so as to be prepared to prove them on the trial, it would have the same knowledge and the same testimony so as to frame the indictment, that it may contain whatever is necessary to put the accused on notice of that with which he is charged, and of which he is to be convicted. Even in civil cases such a rule of pleading obtains. No trustee who has made his returns is liable to have them attacked, unless the notice is given in the proceedings against him. If he has omitted to make a proper charge against himself, a specific allegation must be made thereof, by way of *surcharging*, so as to hold him liable. If he has given himself a credit which is false, or to which he is not in law entitled, the proceedings against him must allege it by a charge *falsifying* it. If this be the liberal rule in a civil case, there should be as equally a benign one in criminal procedure. The law has surely as high regard for the proper guards for the protection of life and liberty, as it does for the protection of property. Let it be noted, that the indictment in this case charges the receipt of various sums of money at different times during the year 1870; and that on the 11th May, 1872, the defendant fraudulently converted a large portion thereof to his own use, etc. The testimony offered and objected to was, that the defendant's books showed payments to certain persons in 1870, and that there were no such persons. There were three of this class that were claimed to be proven not to exist. If it were a fact, in each case it was a crime proved, upon which a conviction could be founded. There were then three distinct offenses, each one independent of the other, each sufficient upon which to rest indictment and conviction; and yet of neither was there any charge or notice until the testimony was offered. The same may be said of the testimony as to larger credits being given by the defendant to himself, than the amounts actually paid. That was sufficient to show fraudulent conversion in each case, and to support indictments charging them, and convictions thereon. It might not be

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going too far to say that it is a good if not the true rule, that where a specific act is an offense under the penal Code, and that act is to be made by proof the ground on which a conviction is to be had as constituting the crime to be punished, that specific act should be charged in the indictment. It is not necessary that the indictment should allege or show the testimony which is to be used on the trial, but it should set forth sufficiently the act committed by the accused, which constitutes the offense charged, and for which act the conviction is sought.

If the affidavits offered by the defendant, in the motion for new trial, be true, and it does not appear but what they are true, they illustrate strongly the virtue of such a rule. The prosecution pretty strongly proved, as it appeared, that there were no such persons as three of those to whom defendant, by his books, had made payments. Such testimony must have weighed with great force on the minds of the jury. For if, in fact, there were not any such persons, the defendant must have stolen these amounts, or rather, embezzled it. The indictment contained no allegation of such acts, and it is to be presumed that the first notice defendant had that they would be raised against him, was after the trial commenced—indeed, as to the particular proof, from the mouths of the witnesses on the stand. He had no time to meet such proof, he may not have known where his witnesses were, or had no opportunity to procure them. With all this testimony, of such terrible import, before the jury, he was convicted. After the trial the affidavits of two of those very three persons, whose non-existence was thus proven, were obtained, showing not only they were veritable human beings, but had actually received payments from the defendant. It is true, the amounts specified in their affidavits as being paid them did not exactly correspond with defendant's books. But the same may be said, as to that fact, as was remarked of the other witnesses, who stated that their amounts did not correspond. At least, the defendant should have had the opportunity to have had those witnesses examined, and by any proper means to refresh

their memories as to the amounts, provided it could have been done.

2. The special plea in bar was properly overruled as such. The Act of October 14th, 1870, only appointed commissioners to audit and approve any outstanding claims there might be against the Western and Atlantic Railroad at the time of the lease. The board of commissioners had no power to discharge, by any act of theirs, any person from liability for a criminal act. The plea amounts to nothing more than that the defendant had accounted with an authorized tribunal, and had settled for all the money that had been entrusted to him. The very facts pleaded could have been proven under a plea of not guilty, and had they been shown under such a plea, might have established his innocence, provided no criminal act had been committed by him in fraudulently converting said money, or any part thereof, previous to said settlement. In *McCoy vs. The State*, 15 *Georgia*, 205, it was decided that a payment to the owner, after a fraudulent conversion had been committed, did not excuse; that the crime was complete, the larceny accomplished, when the money was converted. If so, then a settlement with the commissioners would not purge the defendant of an offense already committed.

Again, a bailor may appoint an agent to make a settlement with his bailee, or he may make it himself. But if the bailee were to impose on him false or forged receipts, and an acquittance given the bailee founded thereon, that settlement would not be a discharge of the bailee for his fraudulent conversions, which were then unknown to the bailor. He would not thereby be protected against either a civil or criminal proceeding. Nor would it be pleadable in bar, for every fact and issue which could arise under the general issue, would also arise under that plea. So, also, in this case, the State, with this plea filed, could set up every fact which it could under the plea of not guilty. A plea of former acquittal or former conviction would be a plea in bar; for if the simple fact pleaded be proved, it bars all other inquiry, any investigation into the guilt or innocence of the accused, and the record es-

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tablishing such former judgment could not be met by a reply of fraud. Once convicted and punished, or acquitted, the defendant cannot be dealt with again for the same charge.

3. We do not think that an officer of the State, or of the Western and Atlantic Railroad, could, under sections 4356 and 4358 of the Revised Code, constitute a person as the bailee of the State, so as to make the State the bailor within the meaning of those sections, except by express provisions of law. Even if the officer so entrusting another with property of the State did so by authority of law, it might then be a question whether the person receiving it, if he embezzled it, etc., would not be more properly indictable under section 4355, as an officer, servant or employee. For if the officer who so entrusted another had legal authority so to do, that officer would, *quo ad hoc*, have the power to appoint the servant or employee, and that person would sustain the relation as defined in section 4355. The punishment would be as great on him for his criminal default in the premises as under either of the sections 4356 and 4358. If the appointing officer had no legal authority to create the trust, then his appointee would be his own agent or bailee, and such a case is provided for by the Act of December 14th, 1871, entitled "An Act to make it penal to withhold money or personal property belonging to the State of Georgia."

4. The indictment is not sufficient under this Act, because, in the first place, the Act makes it penal for such a person to fraudulently, wrongfully or illegally receive such property or money. The indictment does not make any such charge. In the next place, the Act makes it a criminal act for one who legally receives the money or property, to fail to pay or deliver the same to the treasurer of the State or his agent within *ten* days after a demand. This indictment was returned by the grand jury within *five* days after the demand therein is alleged to have been made. So it comes within no part of that Act.

5. Nor can it be sustained under section 4355 of the Revised Code, as it does not charge the defendant to be an "offi-

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cer, servant or person employed in any public department, station or office of government of this State," etc., as prescribed in said section.

Judgment reversed.

BENJAMIN F. CHATHAM, plaintiff in error, vs. JESSE J. BRADFORD, sheriff, defendant in error.

Whilst it is the duty of the clerk of the Superior Court to keep a proper index of his books of record, so that one searching the records may easily find what is or is not contained therein, yet a deed or mortgage which is in fact recorded, does not cease to be notice and to be properly recorded, simply because the index to the record book fails to show where it may be found.

Registry. Clerk of Superior Court. Mortgage. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

At November term, 1871, of the Superior Court of Muscogee county, judgment was rendered in favor of plaintiff against J. H. Bramhall, for \$150 00 principal, besides interest, protest fees and costs, on which execution issued.

The defendant, Bradford, as sheriff, had in his hands—raised by levy and sale of property of said Bramhall, under a mortgage *fi. fa.*, some \$1,800 00, and while so holding said money, said *fi. fa.* in favor of Chatham and two Justice Court *fi. fas.* were lodged in his hands, claiming enough to satisfy them, and a demand in writing for their payment was served on said sheriff.

At the October term, 1872, a rule was granted by the Court requiring said sheriff to pay over to said Chatham the amount due on his said *fi. fa.*, or show cause to the contrary.

In response to said rule, said sheriff answered amongst other things, that he had in his hands said mortgage *fi. fa.*, dated 27th day of August, 1872, issued in favor of E. C. Bramhall vs. J. H. Bramhall, for \$4,331 12 principal, and \$277 59 be-

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sides cost; that said *fi. fa.* was issued upon the foreclosure of a mortgage made by said J. H. Bramhall to said E. C. Bramhall, dated 28th day of February, 1871, upon all the stock of goods contained in store then occupied by said J. H. Bramhall, and duly recorded in the clerk's office of said county, within three months from the date of the said mortgage; that said goods were levied on under said mortgage *fi. fa.* on September 2d, 1872, and were sold at sheriff's sale on the first Tuesday in November, 1872, for \$1,824 10, and that, after deducting \$62 27 expenses, a balance remained in his hands of \$1,761-83; that whilst said money was in his hands, there was placed in his hands by the sheriff's attorney, the following *fi. fas.* claiming the money, to-wit:

Fi. fa. in favor of plaintiff Chatham vs. said J. H. Bramhall obtained first day of December, 1871, in Muscogee Superior Court for \$150 00 principal, \$9 18 interest, protest \$3 00, cost \$9 10.

Justice Court, *fi. fa.* in favor of John O'Brien vs. J. H. Bramhall, dated 31st October, 1872, for principal \$100 00, interest \$15 75, cost and protest fees \$15 65.

Also, Justice Court *fi. fa.* in favor of Wilcox Silver Plate Company vs. J. H. Bramhall, dated 15th June, 1872, for \$66 70 principal, \$3 50 interest and \$3 05 cost.

That, as all of said *fi. fa.'s.* were founded on judgments obtained since the date of said mortgage, and the money in his hands was raised from sale of the mortgaged property, he had paid said balance to the attorneys of said mortgagee; that he had no other money raised from the sale of property of said Bramhall, and that he knew of no other property.

The plaintiff thereupon traversed said answer, and alleged that said mortgage was not duly recorded within three months of the execution thereof; nor until long after the rendition of said judgment in favor of said plaintiff, and that, therefore, said *fi. fa.* in favor of plaintiff ought to be paid out of the money so raised by said sheriff.

The issue thus formed, was, by consent, submitted to the Court without the intervention of a jury. L. T. Downing,

attorney for plaintiff, testified that after said judgment was rendered in favor of Chatham (some time in the spring of 1872), he was informed that a mortgage upon his goods had been executed by said Jacob H., and witness thereupon went to the clerk's office of said Court to examine the record of it; that he looked for it, and got the person in the office, writing for the clerk, to assist him in searching; they searched in the record book of deeds, but did not and could not find that said mortgage had been recorded—nor could he get any item of it, or of the record of it, from said person so then in charge of said office; that both he and said person whom he had requested to assist him in the finding of said record searched in the index of record book of deeds then in use, and which had been in use for over a year, for the recording of deeds, to-wit: deed book *O*., but the index contained no entry of such a mortgage, nor of any record thereof, nor any reference thereto; that he (witness) then, having an idea that Messrs. Peabody & Brannon might represent the mortgagee, called on them for information in regard to it, and was at their office shown the said mortgage, and from the clerk's certificate of record thereon learned the time it had been registered in said deed book *O*., to-wit: the 27th day of May, 1871, and on page 699 of said book; that by these references he was able to find, and did find by them alone, the registry of said mortgage; that afterwards, on again examining said record and the index to said book *O*, he found that said registry had been indexed. The date of the execution of the mortgage was the 28th day of February, 1871, and the date of registry thereof was the 27th day of May, 1871.

For defendant, George Y. Pond testified that in May, 1871, he was clerk of Superior Court of said county; that the registry of said mortgage in deed book *O*. was done by Mr. Duer, who was then writing for him in his officer; and that the entry of reference to said registry in the index to said book *O* was made by Mr. Terry, who, also, had written for witness in his office, and whom he had requested to go through the book and index such deeds, the registration of which had not

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been indexed; that said mortgage had been lodged in the office in the usual way for record, and was actually recorded on the 27th day of May, 1871.

The *fi. fa.* in favor of plaintiff vs. said Bramhall, and also the mortgage *fi. fa.* against him issued on the foreclosure of said mortgage, which was foreclosed on the 30th day of May, 1872, with entries on said *fi. fa.* were considered in evidence.

The demand of plaintiff, in writing, upon the sheriff for payment of his *fi. fa.* out of money in his hands raised from sale of said goods under said mortgaged *fi. fa.* and which demand was made December 11th, 1872, was also in evidence.

The Court refused a rule absolute against the sheriff, and Chatham excepted.

MOSES & DOWNING, for plaintiff in error.

PEABODY & BRANNON, for defendant.

McCAY, Judge.

The sole question made by this record is, whether it is a necessary part of the *recording of a deed* that the clerk shall enter in the index of the book the names of the parties under the proper letter, with the page where the record can be found. Is this necessary to make a complete record of a deed? It cannot be denied that the record of a deed in a large book, with many other records of like character, and without any index to enable one searching to find the page, furnishes, in fact, but a poor notice of the existence of the deed; and without any question, a failure by the clerk to keep such an index is a wrong for which he is answerable to the party injured. But after much consideration we are of the opinion that the entry in the index is not a part of the process of record, so as that the record is null without it. Our Acts for the recording of deeds, beginning in 1755, do none of them point out the mode of registry, nor do they, any of them, require the clerk to keep

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an index. The Act of 1815, Cobb's Digest, 191, provides that the Inferior Court shall see to it that the books are lettered and indexed. So, too, the Code, sections 2663, 2671. It is, also, true that in prescribing the duty of the clerk, section 256, paragraph 7, the Code requires him to index his record books.

But there is nothing in any of these provisions prescribing that the indexing is a necessary part of the record. When a deed has been duly copied upon the record book, it is difficult to say that it is not recorded. The steps to be taken for easy reference, as it seems to us, are matters with which the owner of the deed has nothing to do. He has caused his deed to be copied upon the public books; that is all the law requires of him, and that is all he can do. If any one desires to find the record, he can find it if he will take the trouble. The index is for the benefit of the searcher. It is the means furnished by the public to its citizens for an easy reference to the books of record. It is a provision, not for the benefit of the holder of the deed, but for the convenience of those who desire to examine the record. Ease of access is wholly a question of degree. A book may be indexed by the name of the grantor or grantee, or both—it ought to be by both. It is often convenient, too, in this State, to index the numbers of the lots of land conveyed. But, obviously, all these are matters for the convenience of those who desire to examine the books. If the clerk fails to do his duty, he injures those who desire to search. The duty is, therefore, to the searcher and to the public, and not to the holder of the deed. And this has, as we think, always been the understanding of the law in this State. Many of our books of record have no indexes, or very imperfect ones, and for many years this has been true. Ease of access to a record is a question of degree; it is possible to get at the fact of record or no record without any index. If the books be few and small, it is easy. If the books be many and large, it is difficult. And so, the index may be single or double. The ease or difficulty of finding what is on the record, is not a matter in which the owner of the deed

is concerned. We have been able to find but one case in the books bearing upon this subject, to-wit: *Sawyer vs. Adams*, 8 Vermont, 172. In this case, the deed was recorded in a book that had not been used for years. It was not indexed, even in that; and this was done intentionally by the clerk to conceal the fact. The Court held the record no notice, but there was a dissenting opinion. That was a much stronger case of failure of duty than this. We put our decision mainly on our own statutes, and on the condition of our records, and what we believe to be the uniform practice in this State.

Judgment affirmed.

SUSAN A. BRYCE, by her next friend, plaintiff in error, vs.
SLOMAN WYNN, guardian, defendant in error.

1. A ward, after he has attained the age of fourteen years, has the right to choose his guardian, and for that purpose to have the letters of guardianship issued under the appointment of the Ordinary to a former guardian, revoked.
2. Before such order of revocation is granted, a selection of the successor in the guardianship should be made, which selection must be judicious in the judgment of the Ordinary, and the person chosen should give his consent to his appointment.
3. An application was made by a ward over fourteen years of age, for the revocation of the letters of her guardian, and to be allowed to select a guardian subject to the approval of the Ordinary. On the hearing, the Ordinary discharged the rule against the guardian to show cause, etc., on the ground that there was "no sufficient cause shown for the removal of the defendant." On a second application by the ward for the same purpose, which was carried by consent appeal to the Superior Court, the judgment of the Ordinary was pleaded as former recovery in bar, and it was so adjudged by the Court:

Held, That the decision of the Ordinary will not be construed as an adjudication of the right of the minor to have the letters of guardianship revoked, and to select her guardian, but rather that the refusal of the Ordinary to grant the revocation was because there had been, in his judgment, no "judicious selection" of a successor who would consent to act. If, on the second trial, such "judicious selection" be shown

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to the satisfaction of the jury, and the person chosen consents to accept, the application should be allowed.

Guardian and ward. Appointment. Judgment. Before Judge BUCHANAN. Carroll Superior Court. April Term, 1873.

Susan A. Bryce, by her next friend, petitioned the Ordinary of Carroll county for the removal of Sloman Wynn, her present guardian, and for the appointment of some other suitable person selected by her, subject to the approval of said Ordinary. She showed that said Wynn had been appointed at the June term, 1861, of the Court of Ordinary of said county, when petitioner was but five years of age; that she had then arrived at the age of sixteen years, and desired to exercise her right of selecting her own guardian, she having never exercised that right since she arrived at the age of fourteen.

A rule *nisi* issued in accordance with the prayer of said petition, in response to which said guardian set up that he had been called upon by petitioner, in a similar proceeding, returnable to the December term of the Court, 1871, to show cause why he should not be removed and some other person, selected by petitioner, appointed; that upon cause shown, to the effect that said petitioner could not select another guardian, respondent occupying that position at the time of her arrival at the age of fourteen, and still being such guardian, and not in default in any particular, the Court discharged the rule, and gave judgment against said petitioner, in favor of respondent, from which there was no appeal; that respondent pleads said judgment in bar of this proceeding.

The issue thus formed was carried to the Superior Court by appeal. There it was submitted to the decision of the Court, without the intervention of a jury.

The respondent introduced the judgment pleaded in bar, as follows:

"SUSAN A. BRYCE, by her next friend, vs. SLOMAN WYNN, guardian.

"Rule nisi to remove guardian."

"Upon hearing the evidence submitted and the argument of counsel, it is ordered by the Court that the rule be discharged, there being, in the opinion of the Court, no sufficient cause shown for the removal of defendant. It is therefore ordered that the movant pay all the cost that has accrued in the case."

The facts, as set forth in the petition and answer, were admitted to be true. The Court, on motion, dismissed the case, and petitioner excepted.

MABRY, TOOLE & SON, for plaintiff in error.

AUSTIN & HARRIS, by brief, for defendant.

TRIPPE, Judge.

1. It was held in the case of *Pitts vs. Cherry*, 14 *Georgia Reports*, 594, that a ward in Georgia, on arriving at the age of fourteen, has the right to choose his guardian, subject to the approval of the Ordinary. We do not think the right is taken away by the Code. Section 1806, new Code, in giving the privilege to a minor over fourteen years of age, who has no guardian, of selecting a guardian, was not intended to change the law in this respect. The Act of 1850, Cobb's Digest, 338, implies what is specially provided in the section of the Code referred to.

2. Before the new appointment is made the letters of the former guardian should be revoked, and there should be a selection of a successor in the guardianship, who is willing to accept, and whose appointment would be judicious in the judgment of the Ordinary. The provisions in the Code, as to the resignation of guardians and administrators, show the care that is taken to prevent a vacancy in these trusts. In each case, before a guardian or administrator is permitted to resign he must present a fit and suitable person to the Ordinary as

his successor, who is willing to accept. We think it a proper rule to be followed in the case of a ward selecting a new guardian before there should be a revocation of the letters of the former guardian: See 6 *Georgia*, 432.

3. In the first application made in this case, the Ordinary adjudged that no good reason had been shown to remove the guardian, and discharged the rule which had been issued. We do not think that this was a judgment against the right of the applicant to select a guardian, and to ask for the revocation of the letters of her present guardian. It does not so appear on the face of the judgment, or in the record. But we rather take it, that a good reason did not exist, from the fact of there having been no judicious selection of a new guardian who was willing to accept. Otherwise, we would have to presume that the Ordinary committed an error, and denied a legal right to the applicant. If, on a new hearing of this case, which we direct, it should appear to the satisfaction of the jury that the applicant has chosen a person whose selection, in the language of the Code, is "judicious," to be appointed as guardian, and that such person is willing to accept, the application should be granted.

In this case, as well as in the case of *Pitts vs. Cherry*, *supra*, the first guardian was appointed by the Ordinary. We confine this decision as to the right of a ward to ask for the revocation and new appointment, to the cases of guardians thus appointed.

Judgment reversed.

JOHN R. HOLCOMBE, plaintiff in error, vs. THOMAS W.
DUPREE, defendant in error.

1. When there was a rule absolute taken against a sheriff in 1860, for failing to raise certain money under a *fi. fa.*, and in 1867 an attachment was moved for against the sheriff, and he showed for cause against the attachment that he was not and never had been in contempt of the process of the Court; that though the original *fi. fa.* had been in his

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hands, the failure to raise the money on it was, in consequence of written orders of the plaintiff, not to proceed with it; that the rule absolute was taken by consent and at the request of the plaintiff, with intent thus to induce the defendant's agent and representative to pay it, and with the express agreement that it was not to be used against the sheriff:

Held, That the foundation of a rule absolute is the contempt of the Court in the failure of the sheriff to obey its order. And the rule will not be enforced by attachment, but will be set aside, if it be made to appear that the officer is not really liable, and the judgment on the rule is for this purpose always open, under the discretion of the Court, to a rehearing.

2. In this case, if the answer of the sheriff be true, (and the demurrer admits the truth,) the rule absolute ought not to have been granted, as the sheriff was not in contempt, and it was error in the Court to grant the attachment under the admitted facts set forth in the record.

Rule against officer. Attachment. Contempt. Before Judge HARVEY. Haralson Superior Court. March Term, 1873.

At the April term, 1860, of Haralson Superior Court, Thomas W. Dupree obtained judgment against Wilson F. Blackstock, for the principal sum of \$635 91, besides interest and costs. Execution was issued May 21st, 1860. At the October term, 1860, a rule *nisi* was issued against the sheriff, requiring him to show cause why he had not made the money on said execution. At the same term the rule was made absolute.

At the October term, 1866, a rule *nisi* was issued against the sheriff requiring him to show cause at the next term why he should not be attached for contempt in failing to comply with the rule absolute granted at the October term, 1860.

At the April term, 1867, the sheriff answered that on the 25th of April, 1860, he received written instructions from the plaintiff in *fi. fa.* not to levy until further orders; that when ordered, to-wit: on the 24th of November, 1860, he levied on the land of the defendant, the sale of which was enjoined, and that afterwards the entire property of defendant was disposed of under and by direction of the Court; that defendant in *fi. fa.* was killed only a few days before the October term, 1860, of said Superior Court; that it was

known to the plaintiff that defendant had the money to pay off the *fi. fa.* at the time of his death, and that counsel for plaintiff in *fi. fa.* assured respondent, while the motion for the rule absolute was pending, that if obtained, the said rule should never be enforced against him; that it was sought only for the purpose of inducing the legal representative of defendant to pay the *fi. fa.*; that he was thus induced not to defend the rule; that after the rule was obtained, and contrary to the expectation of the said counsel and himself, the administrator of defendant in *fi. fa.* was enjoined by a Court of equity from paying the debts of his intestate, except as might thereafter be decreed by the Court; that a motion had been made, and was still pending in that Court, to have the rule absolute set aside and declared void for fraud.

Plaintiff in *fi. fa.* joined issue on the answer at the April term, 1867. Thus the case stood till the March term, 1873, when the sheriff amended his answer as follows: He denies that he was liable when the rule *nisi* against him was made absolute, because he says he had obeyed strictly the orders of plaintiff in *fi. fa.*; that while the motion for rule absolute was pending, counsel for plaintiff told respondent that he had learned that defendant had left money in the hands of his widow, and requested her, just before his death, to pay this debt, but that she hesitated to pay it, and doubted her safety in doing so unless there was a rule against respondent; that he was then and there induced by the said counsel not to defend the said rule under the positive promise that the rule, if obtained, should never be enforced against him, and that the same should only be used for the purpose of inducing the widow of defendant to pay the *fi. fa.*; that relying upon this promise he suffered the rule to be made absolute without objection, therefore it should be set aside for fraud. Respondent offered to amend further by adding that plaintiff had, by his negligence, allowed the original judgment against the defendant in *fi. fa.* to become dormant, which amendment the Court refused to allow, and respondent excepted.

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Plaintiff demurred to the answer as amended. The demurrer was allowed, and respondent excepted.

After argument the Court passed an order overruling the motion to set aside the rule absolute, and directing the arrest and imprisonment of respondent till the *fi. fa.* should be paid. To which ruling he excepted.

Error is assigned upon each of the above grounds of exception.

WILLIAM J. HEAD, by Z. D. HARRISON, for plaintiff in error. •

JOSEPH A. BLANCE, by E. N. BROYLES, for defendant.

McCAY, Judge. •

1. This Court, in two cases, has decided that rules absolute against the sheriff for contempt, do not stand altogether like judgments between parties. They do not operate as estoppels, but the Court, upon a proper case made, will go behind the order and look into the truth of the case: See *Chipman vs. Barron*, 2 *Kelly*, 220, 15 *Georgia*, 182. As the sheriff's answer is not traversed, it is to be taken as true. If it be true, he never was in contempt. His failure to execute the process was by reason of a written order of the plaintiff not to do so. The rule absolute was taken by consent and with a definite purpose other than to treat the sheriff in contempt. There was, too, a special agreement not to press it against the sheriff. This was, in fact, a fraud upon the sheriff. In an ordinary judgment the sheriff would, perhaps, be estopped by the judgment from setting up, at least, by parol, that the judgment was not to be enforced. But, as we have said, rules absolute do not operate as an estoppel. They may be looked to by the Court in its discretion, and re-examined. In truth, they depend for their validity on the fact that they are the punishment of the Court for its officer, for contempt, and it is only collaterally that they are for the benefit of the party. The Court, if the sheriff be not in fact in contempt, will re-

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lieve him from its order. In this case the parties have, by agreement, without consulting the Court, taken its extraordinary process out of its hands. This cannot be done so as to deprive the Court of the right to open the case and look into the facts. In other words, there is no estoppel, no reason why the truth should not be known and acted on.

2. As we suppose, it was only because of this supposed estoppel, *res adjudicata*, that the demurrer was sustained, we reverse the judgment. If the statement of the sheriff be true, it would be a great wrong to make him pay this money.

Judgment reversed.

WILLIAM H. TUTT, plaintiff in error, vs. ROBERT H. LAND,
defendant in error.

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1. Where the Court, at a regular term, appoints an auditor, in a case involving matters of account, with the powers as provided in section 4202, of the new Code, and no exceptions thereon are certified, filed, etc., during the term as by law prescribed, it is too late when the auditor proceeds to act in vacation, to object to his appointment, or to the powers conferred on him, or to make such objections the ground of exceptions to his report.
2. When a contract of partnership provides that one partner shall furnish the stock of goods (drugs) then on hand, and the other shall give his skill, services, etc., and the first shall have three-fourths of the net profits, the other the remaining fourth, the partner so furnishing the capital is not entitled, in the division of the profits, to interest on the capital stock.
3. One item of the contract was, "if the wants and necessities of said business demand an increase of capital, and the same be supplied by the said, (the partner who furnished the original stock,) the firm stipulate to pay him interest therefor at the rates," etc. :

Held, That the simple fact that said partner did not withdraw the whole of his share of the profits for the first year, without any agreement or notice to the other partner that the capital was to be increased to that amount, did not give such partner the right of interest on such excess.

4. Nor was such partner entitled to claim for the ordinary, natural depreciation of the goods and fixtures of the store, both constituting the capital stock.

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5. When one partner seeks, by way of recoupment, to have a deduction made from the amount of the claim of the other in the profits, on account of fraud or neglect, or acts of disloyalty to the partnership, whereby the interest of the firm suffered damage, such deduction cannot go beyond the amount of damage proven.
6. Though the Court may make an unauthorized remark in reference to a question asked a witness, yet, if the testimony in connection therewith be on a matter which, under the whole evidence, could not have availed the party complaining, it is not such an error as will call for a new trial.

New trial. Auditor. Judgment. Exception. Partnership. Interest. Recoupment. Damages. Immaterial error. Before Judge GIBSON. Richmond Superior Court. October Adjourned Term, 1872.

Land filed his bill against Tutt alleging that complainant and defendant formed a copartnership in the drug business, in the city of Augusta, on July 1st, 1868, which continued until October 31st, 1870, the terms of which were reduced to writing. That complainant was to receive one-quarter of the profits and defendant three-quarters; that the defendant, at the dissolution, agreed to account with him for his share of the large profits which had been made, but had failed to do so; that defendant is indebted to complainant about \$10,000 00, and refuses to account. Prays discovery, relief, etc.

The defendant answered substantially as follows: That he admitted the partnership as charged; that the articles are in writing and in his possession; that the profits were to be divided as alleged; that he formed said co-partnership on account of his belief in complainant's integrity and business tact. Admits the duration of the partnership as alleged; charges that complainant left without his consent and without any notice; that by his dishonest acts and attempts to decoy custom from their house to one in the same business, in which he contemplated becoming, and did subsequently become, a partner, and by other dishonorable acts, he defeated the sole consideration of the contract; that by his sudden departure he greatly injured defendant. Alleges that complainant violated his agreement in said articles, not to draw but \$2,000 00 per annum,

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but did draw in the two and a quarter years out of the partnership, \$6,381 08. Denies that he is indebted to complainant as alleged, stating that after deducting expenses of closing up business, bad debts, etc., there would remain to complainant's credit \$1,393 95; and that, owing to said bad faith and dishonesty, he has sustained damages, which recouped leaves nothing due, but makes complainant his debtor. Answers prayer for discovery:

1st. That the articles were in writing, accessible to complainant and in defendant's possession.

2d. That the profits during the continuance of the business were \$45,561 35, of which complainant's share would be \$11,390 35; deduct amount drawn out, leaves due him, \$3,028 04; from which is to be deducted his share of the expenses of winding up the business and his proportion of the bad debts.

In said answer defendant makes certain allegations in the nature of a cross-bill, alleging that he furnished all the capital; that the consideration moving him to take complainant into partnership was his reliance on his honesty and business tact; that this consideration failed on account of his dishonest acts—his dishonorable conduct in turning business from the house to another drug store in said city, in which he contemplated and soon after did become a partner; his misrepresentations that defendant ordered him to adulterate drugs; his outspoken assertions that he intended to "burst up" the concern; his dishonesty in taking goods from the store without charging them to himself, etc.

To this answer and cross-bill complainant filed his answer, denying all acts of bad faith or dishonesty, and claiming that by his exertions the business was greatly increased; denies contemplating any other business connection while in said co-partnership, and admitting that subsequent to the dissolution, he did enter into a partnership in the same city, and the same line of business with one Barrett; claims that Tutt injured the business by his neglect, and lays his damage at \$10,000 00.

At the January term, 1872, the following order was passed:

"It appearing that there are questions of complicated account in the above cause, it is ordered, that Joseph B. Cumming be, and he hereby is, appointed auditor, to investigate the matters upon said accounts, and all matters touching the allegation in cross-bill of defendant, with power to subpoena witnesses, administer oaths and hear testimony on any disputed fact or facts, and with other powers usually and customarily conferred on masters in chancery in like cases."

On June 1st, 1872, the auditor filed his report in the clerk's office. It was in substance, as follows:

1st. That the allegations in the cross-bill, to the effect that the character of the house was injured by the bad faith of complainant, is not sustained. It appeared that some few customers were offended in the course of their business transactions with the house, but such offense was not shown to have been fairly attributable to complainant, or if attributable to his bad conduct, such conduct did not appear to have been conceived either in bad faith to his copartner or to his customers, but in zeal for the common business.

2d. The allegation that during the continuance of the partnership the complainant conceived the idea of going into business with another party, and commenced decoying patronage from the house, is unsustained by the evidence.

3d. The charge that complainant, in pursuance of a scheme to divert business from the house, made improper charges for articles, false representations of the character of the drugs, and malignant insinuations that defendant had ordered the adulteration of the drugs, is wholly unsustained by any evidence, except so far as it is shown that a higher price than usual was charged for a quantity of quinine, but this does not appear to have been done by complainant in any bad faith to his copartner, and is reasonably explained.

4th. As to the allegation that complainant took money and articles from the store without accounting for them, evidence was adduced that there were irregularities in the cash, and that circumstances of suspicion pointed to the complainant as the person producing these irregularities, and that he, as well

as other persons, was suspected. The amount of cash abstracted, if any, is nowhere ascertained. There is an entire lack of any such certainty, both as to the amount taken (if any) and the taker, as would enable an offset to be established. There is no evidence going to show that articles other than cash were taken.

5th. As to the allegation that by these means the business was injured to the extent of \$10,000 00, the auditor reports that the evidence fails to show any damage accruing from the conduct of complainant.

This disposes of the charges contained in the cross-bill. As to the issues formed by the bill and answer, the auditor reports, in substance, as follows :

1st. The deduction of ten per cent. on account of depreciation of merchandise, to be taken from the profits, as claimed by defendant, is not allowed. This item is \$4,098 17.

2d. The deduction from value of fixtures, on account of depreciation, to be taken from the profits, as claimed by defendant, is not allowed. This item is \$2,170 99.

3d. The auditor finds that no interest is chargeable against complainant on account of capital put into the business by the defendant, and disallows the deduction claimed from the profits on that account. This item is \$1,489 48.

4th. The auditor disallows the deduction from the profits, claimed by the defendant, on account of the keep of a house which had belonged to the partnership, from November 5th, 1870, to March, 1871, for the reason that the house was turned over in November, with the other assets of the firm, to the defendant, and became, from that time, his property. This item is \$85 87.

5th. The auditor allows the deduction from the profits of the amount paid the book-keeper, Connor, for extra services in winding up the partnership accounts. This item appears to have been paid to him by the defendant, in good faith, for such services. It amounts to \$700 00.

6th. With these allowances and disallowances the auditor finds that there is due from defendant to complainant, for his

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one-fourth share of the profits for the twelve months ending June 30th, 1869, the sum of \$5,974 51. For his one-fourth share of the profits for the twelve months ending June 30th, 1870, the sum of \$5,522 96. For his one-fourth share of the profits for the four months ending October 31st, 1870, \$192 61. From the total of these sums is to be deducted the aggregate amount drawn out by defendant for the support of himself and family, to-wit: \$6,567 09. This sum is increased by interest on \$231 00 from July 1st, 1869, to date of dissolution, and on \$986 08 from July 1st, 1870, to date of dissolution. This interest is charged on the excess over \$2,000 00 per annum, which complainant drew out of the business, he being limited to that amount. The amount drawn out of the business by complainant is, therefore, principal, \$6,567 09, interest, \$38 97, total \$6,606 06. This sum taken from \$11,690-08, the amount of complainant's share of the profits, leaves due to him the sum of \$5,084 02.

This sum, with interest from the date of dissolution, is, in the opinion of the auditor, the indebtedness of defendant to complainant. A portion of the profits is represented by choses in action, to-wit: about \$3,500 00, and the auditor finds that complainant should take in part discharge of his claim, one-fourth of these choses in action, fairly selected.

The auditor further reported that the solicitors for defendant had presented a protest against the powers exercised by him, in going into the hearing of the case upon the allegations made in the pleadings, which protest was overruled and filed with the report.

Said report was excepted to, in substance, as follows:

1st. Because the Court had no authority to appoint an auditor and to confer on him such powers as the auditor exercised in this case, without the consent of the parties.

2d. Because the auditor erred in overruling the protest referred to in the report.

3d. Because the auditor reports that all the allegations in the cross-bill are unsustained, when he had no authority to

pass on such questions; and further, because the evidence, when before the Court, will sustain every allegation.

4th. Because the auditor disallowed the ten per cent. on account of depreciation of stock, which per cent. the defendant claimed had been the amount of depreciation in the stock and should be deducted from the profits.

5th. The auditor further erred in stating the amount of that item to be \$2,170 99; it should have been about double that amount, to which disallowance and erroneous calculation defendant as aforesaid excepts.

6th. Because the auditor disallowed interest on the capital put into the business by defendant, and assumed in his report that the articles of copartnership justified this disallowance; whereas, it is respectfully submitted that this part of the report is clearly based upon a misapprehension of both the spirit and the letter of the contract of partnership.

7th. Because the auditor, after considering the allowance and disallowance mentioned by him, reports a balance due of \$5,084 02, from defendant to complainant, which finding and report is hereby excepted to as erroneous, for reasons heretofore stated, and for further reason that it seems to leave out of the calculation the \$700 00 paid for extra services to Conner, the book-keeper, which the report elsewhere admits should be allowed to defendant.

The Court overruled the exceptions so far as to allow the report to be read to the jury. The trial then proceeded upon the issues formed by the report and the exceptions. The evidence introduced was voluminous, but is unnecessary to an understanding of the decision. The articles of copartnership under which the complainant and defendant did business, were, in substance, as follows:

1st. Form partnership in the firm name of "William H. Tutt and Land."

2d. Tutt contributes \$29,815 00 in stock.

3d. Land devotes time, labor and skill to business.

4th. Profits shall be divided as follows: three-fourths to Tutt and one-fourth to Land.

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5th. Profits shall only be reckoned after deducting all expenses of the business, among which is included the sum of \$2,500 00 per year to be paid to Tutt for rent of store.

6th. Gives power to Tutt to terminate business connection at any time by giving thirty days notice to Land, and upon settling with him upon the basis above set forth.

7th. Provides for keeping books.

8th. Provides that if the business requires an increase of capital at any time, and the same should be supplied by Tutt, the firm shall pay him therefor the same interest, commissions and charges as the banks of the city of Augusta ask and obtain for like accommodation.

9th. Prohibits either member from indorsing or becoming surety during continuance of firm.

10th. Prohibits Land from drawing from the assets a larger sum than \$2,000 00 per annum, or a proportionate amount thereof for a less term than a year. Any surplus that may be due him as a part of his one-fourth interest in the profits, to remain in the business as capital until the dissolution.

The evidence showed that at the expiration of the first year's operations, defendant left in the business, of his share of the profits, \$19,817 98. This was done without any notice to, or agreement with complainant, that the capital was to be thus increased.

The jury returned the following verdict: "We, the jury find that no interest is due to respondent upon the capital stock paid in by him, or upon any advances made during the partnership, nor any damages to be deducted from the amount of profits due complainant. We find the amount due complainant to be \$5,084 00, less \$275 00, his proportionate share of the auditor's fee and the amount paid to Connor; \$822 00 of said remaining balance due, to be paid in notes and accounts due said firm of Tutt & Land, the same to be selected on the plan designated by the auditor, and by said auditor, and if refused by respondent to be thus distributed in ten days, then to be paid by him in greenbacks; that is to say, we find for complainant \$4,809 00, \$822 00 to be paid

as above specified in notes and accounts to be selected by the auditor within ten days, or greenbacks."

The defendant moved for a new trial upon the following grounds:

1st. Because the verdict is contrary to the evidence and the law.

2d. Because the verdict is decidedly and strongly against the weight of the evidence.

3d. Because the Court erred in refusing to hear counsel for defendant: 1st. Upon his protest against the auditor's exercising the functions and powers conferred upon him by the order of Court appointing him. 2d. Upon the exceptions filed to the auditor's report after it was made and returned into Court, the Court not only refusing to hear argument against the admissibility of the auditor's report, but also ordering it read as a part of the pleadings in the case to the jury, then adjourning the Court over until next morning.

4th. Because the Court erred next morning in refusing, upon the opening of the Court, to hear argument either upon said protest or exceptions, and in saying that he would submit the following points arising from that report to the jury, to-wit:

The questions to be submitted to the jury—

First. Did the respondent sustain damage by the conduct and management by complainant of the business of Tutt & Land, and how much?

Second. Should ten per cent. be allowed for depreciation of the value of the stock on hand? If so, what sums? Also consider the allowance asked for depreciation of furniture.

Third. Should interest be allowed on the cash furnished to said business by respondent?

Fourth. Is \$5,084 00 the balance due complainant from respondent, after a full and fair accounting, or is he indebted to respondent?

It is respectfully submitted that this was error for the following reasons: 1st. Because it left the auditor's report before the jury with all the weight of the high character of the au-

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ditor in support of it; and that report passed upon every question of the case, whether of law or evidence—a power which, as auditor, he could not exercise, even under the order of the Court, because the Court had no power to grant such an order. 2d. Because it limited the jury to four stated exceptions or questions, so presented by the Court, and denied to the defendant the right to have all his exceptions passed upon by the Court and jury *seriatim*.

5th. Because the Court erred in refusing to hear counsel for defendant who proposed to show that the order of the Court appointing the auditor, was illegal and invalid for want of rightful authority, as well as the action of the auditor under and by virtue of it—and in sending the auditor's report before the jury, first as pleadings and then as evidence.

6th. Because the Court erred in the following remark: When defendant's counsel asked of one of his witnesses, to-wit: George D. Connor, if he ever heard Land express any desire in regard to what Dr. Tutt should do with his share of the profits of the business—the witness answered yes, that he had heard Land say he wished the doctor (Tutt) would draw out his profits. Whereupon the opposite counsel moved to strike out the whole testimony, which had been before admitted to show that Land knew and acquiesced in the fact that Tutt's share of the profits had been and were being added constantly, as new capital in the concern. The Court refused the motion to strike out, but in so doing remarked, "I'll not rule out the testimony, but the question of defendant's counsel was an unfortunate one."

7th. Because the verdict was contrary to the charge of the Court in this, that the Court charged the jury as follows:

"The jury must find against that part of the report of the auditor which disallows interest on the new capital, if, from the evidence, it appears that the profits, or any part thereof, due Dr. Tutt, were used in the business of the partnership, and on this part they must find interest."

The evidence showed abundantly and beyond dispute, that the profits accruing to Tutt, which were quite large, were put

into the business, and the contract of partnership showed that interest was to be paid thereon.

8th. Because the Court erred in refusing to give the fifth request to charge of defendant, which was duly submitted in writing: "If the jury believe, from the evidence, that the plaintiff has failed to comply with the obligations arising under the same contract, then they must estimate and allow the defendant to recoup the damage he has sustained thereby; and in estimating the damages, they are not bound to find only the amount actually discovered and shown by the defendant, but may exercise their own discretion and find such damages as they may reasonably consider, from the light of the evidence, has resulted from the neglect or fraud of the plaintiff."

9th. Because the verdict is contrary to the charge of the Court, in this, that the Court charged the jury as follows: "If you find there was a depreciation of the stock proven, the Court charges you that this is a proper charge upon the copartnership assets, before net profits can be declared, and this is also true of the depreciation of the fixtures, if you find such depreciation to exist."

10th. Because, before this, and during the progress of the trial, the Court erred in instructing the jury, "that, although the articles of copartnership provided interest on the new capital, at bank rates, which were shown to be nineteen per cent. in Augusta, yet they could allow but seven per cent."

The motion was overruled, and a new trial refused. Whereupon the defendant excepted upon each of the grounds aforesaid.

HOOK & GARDNER; W. H. WEBB, for plaintiff in error.

McLAWS & GANAHL, for defendant.

TRIPPE, Judge.

1. No exceptions were certified by the Judge and entered of record, when the order appointing the auditor was granted. It was too late to raise the objection to the appointment, when

the auditor proceeded to act under the authority conferred, or to make such objection the ground for excepting to his report: New Code, sections 4250, 4254.

2. The contract of partnership was, that one partner should furnish the stock of goods then on hand, and the other should render his skill, services, etc. It was further agreed that the first should have three-fourths of the net profits, and the second the remaining fourth. Under such a contract the partner furnishing the capital is not entitled to interest on the stock when a division of the profits is made. We can see no reason for such a claim. Such partner gets all the profits by the contract that are made on three-fourths of what he puts in the concern. The other fourth was intended as a set-off to the skill, time and services of the other partner, and the profits thereon to be his compensation. To hold as claimed by plaintiff in error, would give that other partner the net profits on one-fourth, *less the interest thereon*. Such was not the contract. Net profits of an adventure do not mean what is made over the losses, expenses and *interest on the amount invested*. The term includes simply the gain that accrues on the investment, after deducting the losses and expenses of the business. If but two or three per cent. is realized on the amount put in, it may be a poor business, but still there would be net profits, even if the legal rate of interest were ten per cent. or greater.

3. It was further stipulated in the articles of partnership that if the necessities of the business required an increase of capital, and the same be supplied by the partner who furnished the original stock, the firm should pay him interest therefor at a certain rate. At the end of the first year the amount of profits and the share of each partner was ascertained. It was not agreed that there was any necessity for an increase of the capital of the firm. Nor was there any understanding that it was increased. The partner entitled to draw the largest share of the profits simply permitted a portion of it to remain. No notice was given to the other that the rights of the firm attached to said undrawn portion. It was sub-

ject at any time to the owner of it. He never parted with his individual right to it, by making it a part of the firm capital. It never was subject to the terms of the partnership agreement, so as to give the other partner any authority to contest whatever right the owner might be pleased to assert over it. Had he desired to have taken it at any moment he could have so done, no matter what the immediate interests of the firm might require. This right would not have existed if it had been regularly made a part of the capital stock. And it would be manifestly unjust that he should have had the power, at pleasure, to make an individual appropriation of a large amount, and at the same time claim a heavy interest for whatever time he might not see fit so to appropriate it. Besides, the contract specially provided that Land, the working partner, so to call him, should only be entitled to draw a specific portion of his share of the profits. The balance of his interest was to remain in the firm. By the contract it was to become part of the capital. As this increase was directly provided for, and as it was also expressly contracted for a further increase, if necessity demanded it, such increase, if made, should not be left to the mere discretion of one partner to determine as he might choose at any time, whether or not his undrawn portion of the profits had become an addition to the firm capital on which he was entitled to both profits and interest.

4. The goods and fixtures constituted the stock furnished by Dr. Tutt. At the dissolution he claimed that there was a depreciation of the stock, and that he should be paid for it. It was not pretended that the value was lessened by reason of damage or injury from accident or other special cause. Had it so been, there might, probably be force in the question whether it was not a claim under the head of losses, and therefore properly chargeable to the firm. But it appeared that it was only the ordinary, natural depreciation that may occur in all things. At the time the partnership was formed, the value of the stock was ascertained, inserted in the articles, and it was agreed that Dr. Tutt should keep that sum in

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the business for the use of said firm during the continuance of the partnership, "and that the said sum of money or its equivalent in stock of goods is to constitute the capital to be used and employed," etc. We do not think that under this contract the partner who furnishes the stock, can, at the dissolution, claim for the ordinary, natural decrease in value of the goods. That is a risk or incident which attaches to his property, and is doubtless an item considered and passed upon by the party who invests his capital in that form, when he enters into such a contract. If A and B were to form a partnership for farming purposes, A to furnish the land, and horses and mules for ploughing, and B his skill, labor and superintendence, and the profits to be divided equally or in any given ratio between them, could A, at the end of two years or other period, when the dissolution might take place, claim compensation for the decreased value of his horses or mules on account of their increased age, or for the wear and waste of his land from time and cultivation, etc.? It would scarcely occur to the mind of any one that such a right existed on the part of A, unless it was so specified "in the bond." Another item in this contract settles this question, as well also as the question of the right of Dr. Tutt to claim interest on his original capital. That item is: "It is agreed between the parties that the said gains, increase and profits shall only be reckoned, after deducting all *expenses of the business*, among which expenses is included the sum of \$2,500 00 per year to be paid to the said W. H. Tutt for rent of the store on Broad street, supplied by him to the partnership for carrying on the business." The proper construction of this item excludes the idea of his claim for such interest, and for the ordinary depreciation of the stock he contributed. As well might it be asserted for the depreciation by time and use of the house, for that was also supplied by him to the firm.

5. Plaintiff in error further sought, by way of recoupment, to have a deduction made from the claim of Land in the profits, on account of alleged fraud, neglect, and acts of disloyalty to the partnership by Land. The Court charged, in

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substance, that this could be allowed by the jury to the extent of damage proven. We do not think the charge should have gone further. A jury should have a measure of damages furnished by the evidence, especially for a breach of contract. They cannot go out into a field of speculation as to what the damages may probably be. Land was not suing for his *services* on a *quantum valebat*, or on a contract for a stipulated sum as their value. It was for a claim to property. Had it been for services as clerk, and he had violated his contract as a clerk or servant, the question would be presented, whether the breach on his part was not a forfeiture of all claim under the contract. But it cannot be the rule that one partner can set up that the other has been false to duty, and thereby he can claim all the assets, capital and profits. He may recoup or claim for damages; but must show what the damages are.

6. The remark made by the Judge, at the trial, which is excepted to by plaintiff in error, was upon a matter which, under the whole evidence, could not have availed the party complaining. Strike out the answer of the witness, about which the remark was made, and under the view we have taken, the decision must be the same. Whether it was unauthorized or not, no legal injury could have resulted from it.

Judgment affirmed.

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FOSTER BLODGETT, superintendent, plaintiff in error, vs.
ISAAC E. BARTLETT, defendant in error.

1. Where a railroad train was stopped at a station, but somewhat away from its usual place of stopping at that station, and where there was not good ground for getting off, and a passenger, thinking the train would be moved up to the usual place, failed to get off, as he had intended, and after the train had left the station and was fairly on its way to its next stopping place, the passenger himself seized the bell-rope, rang the engine bell, and took his position on the lower step of the platform to get off, and the engineer having answered the bell, as the cars were coming to a stop, but before they were stopped, the passenger, deeming the motion slow enough for safety, undertook to step off, but just as he was stepping he was, by a sudden jerk of the cars,

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thrown down, and his arm crushed by one of the wheels of the car passing over it :

Held, That the conduct of the passenger in himself ringing the bell, taking his position on the step, and undertaking to step off whilst the cars were still in motion, was a want of ordinary care, and showed gross negligence on the part of such passenger.

2. It was error in the Court, under the facts, to charge the jury in effect, that the road would be liable, if, at the time of his attempting to step off, the cars were moving so slowly as that he thought it was safe then to step off.

Railroads. Passengers. Negligence. Before Judge HARVEY. Gordon Superior Court. February Adjourned Term, 1873.

Bartlett brought case against Blodgett, as superintendent of the Western and Atlantic Railroad, for \$25,000 00 damages, alleged to have been sustained by him on account of the negligent conduct of the defendant in his avocation as a common carrier. The declaration charged that the plaintiff embarked on the cars of defendant at Atlanta, for the purpose of being transported to Calhoun, a station on the line of defendant's road ; that said cars failed to stop at the usual station at Calhoun, whereby plaintiff was forced to disembark at an unsafe point, and in attempting to get off the train at said improper place, through no fault of his, his right arm and hand were crushed to such an extent as to render amputation necessary.

The defendant pleaded the general issue, and that if the plaintiff was injured, as alleged in his said declaration, it resulted from his own negligence.

The plaintiff testified substantially as follows : Lost his arm in consequence of an injury received on the Western and Atlantic Railroad on May 7th, 1870. He got on the train at Atlanta for the purpose of going to Calhoun. When the train reached the latter point it did not stop at the usual place. He looked out, but did not at first know that he was at Calhoun. The train stopped below the south end of the depot. The car in which he was, was below the south end of the hotel. Has since stepped the ground. The place where he was stopped was one hundred and fifteen steps below the depot.

The ground at that point was very rough, and it would have been exceedingly difficult there to have disembarked from the train. On the west side there were switches and a ditch, probably two and a half feet deep. On the east side there was a steep bank and a ditch. The ends of the cross-ties were rough and above the surface, and about eighteen inches apart. Thought the train would pull up to the plank platform at the depot, the usual place of discharging passengers. There had been a railroad pic-nic at Marietta, and on account of the large number of persons on board, the train was longer than usual. He was in the third or fourth car from the engine. When the train stopped he came out of the cars and stood on the platform. Saw a lady get off from a car below the one he was on ; two gentlemen with a light assisted her. The train remained stationary one and a half or two minutes and then moved off rapidly. It passed the depot, and plaintiff perceived it was not going to stop. When it was about opposite Boaz & Barrett's store-house, he reached up, seized the bell rope and rang the bell ; the engine blew on the brakes and the train began to slack up. It had run some two or three hundred yards after he had rung the bell, and was moving very slowly, when he got down on the steps, his left foot on the lower step, and was holding on to the iron railing of the steps with his left hand. The train had not stopped, but he thought it safe to get off. Just as he attempted to step off with his right foot, the train gave a sudden and violent jerk, which threw him off his balance, causing him to fall on his left side with his right arm across the track ; thought from the suddenness of the jerk that the engineer had pulled open the throttle of his engine. The trucks of the car passed over his hand diagonally. He pulled it off the track and got up. As the rear car passed him, a train hand asked him if he was hurt ; replied that he was ruined. The train hand jumped off and came to him. Had been, during his life, a railroad conductor, and knew it was hazardous to get off a train when in motion. Was not drunk ; had only

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taken three drinks on that day. The accident happened about midnight ; it was very dark.

The remainder of the plaintiff's testimony relates to the extent of his damages, etc. He was corroborated as to the unusual point at which the train stopped, upon its arrival at Calhoun, and as to the time it remained there, by several witnesses.

The evidence for the defendant tended to show that the train stopped at the usual point at Calhoun, remained the usual length of time, and moved off in the ordinary manner. Also, that the plaintiff was drunk.

Amongst other things, the Court charged the jury "that if the train carried the plaintiff beyond his point of destination, he should have waited until the train should have been stopped, or so nearly so as to make it apparently safe, and then get off, or have suffered himself to be carried to the next station, and then have sued for damages from loss of time, and for the inconvenience, labor and expense of traveling back."

The jury returned a verdict for the plaintiff for \$4,000 00. The defendant moved for a new trial, because the verdict was contrary to the law and the evidence, and because of error in the aforesaid charge. The motion was overruled, and the defendant excepted.

J. A. GLENN ; D. A. WALKER ; J. C. FAIN ; J. E. SHUMATE, for plaintiff in error.

W. H. DABNEY ; J. A. W. JOHNSON, for defendant.

McCAY, Judge.

1. Assuming that the employees of the Western and Atlantic Railroad were in fault in not stopping the cars at a suitable place for the plaintiff below to get off, it does not at all follow that the State is liable for the damage which was subsequently inflicted. A prudent man, under the circumstances, would have sought the conductor, or gone on to the

next station, and if any injury came from this he would have his right of action. But the plaintiff took the affair into his own hands. He rang the bell to the driver to stop the train. This he had no right to do; at least, only in very extraordinary cases has a passenger a right to do this. The rope is not there for the use of passengers, but to enable the conductor to communicate with the engineer. So dangerous a thing as a train of cars is not to be at the mercy of a passenger. The public interest, as well as the rights of the railroad company, require that the bell rope shall be sacred to the touch only of the proper officer. When the bell was rung, and the driver commenced obeying it, the plaintiff had no business on the platform; at least he was there at his own risk, till the cars stopped. The platform is not a safe place to be, and it is not made to ride on; still more careless was he to go down upon the step, where any sudden jar might throw him off. But, in our judgment, it was perfect recklessness to attempt to jump off before the cars stopped, especially as the signal to stop did not come from the proper person. That at the moment there was a jerk of the cars, does not, we think, help the case. Such jerks in stopping must occur, and when he undertook to take control of the train, and leap from it in the dark, he should have thought of this liability. That he thought the speed was sufficiently slackened, is his misfortune. And it seems to us absurd to say that a railroad company, in stopping its cars, is bound so to stop them as to avoid danger to passengers who undertake to get off before the stoppage is complete. No man has a right to assume that it is safe to get off a train that is running at any speed, since, until it is entirely stopped, there may or may not be changes of motion, jerks and other irregularities, dangerous to one in the act of getting off.

2. We think the Court erred in charging the jury that the road was liable if the cars had got so slow as to make it apparently safe. It was not an open question under the evidence. The cars, according to the plaintiff's own testimony, were still in motion, and so rapidly that they did not finally stop until the

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rear of the train, some eight or ten cars' lengths from him, had gone considerably past him. No man of ordinary prudence would have done such a thing; it was a rash, reckless act, and displayed want of ordinary care. We are ready to hold railroads to the strictest terms of liability, but to say that a passenger who desires to get off and who, under the circumstances, has a right to get off, may take it upon himself to ring the bell and leap off while the cars are still in motion, however slow that motion may be, is, we think, laying down a rule not only unjust in itself, but one dangerous to the public safety.

Judgment reversed.

PLEASANT J. PHILLIPS, plaintiff in error, vs. HENRY MCNEICE, administrator, defendant in error.

1. Where a bill of exceptions was certified on January 24th, 1873, and service perfected on February, 17th, 1873, the writ of error will be dismissed. (R.)
2. A party being prejudiced in his rights by the action of the Judge after the presentation to him of the bill of exceptions for his signature, under circumstances which may be remedied by the writ of *mandamus*, must make his application for said writ on or before the third day of the term of this Court next after the the bill of exceptions is tendered, or he will not be heard. Rule 29. (R.)
3. An acknowledgment of "due and legal service" of the bill of exceptions, and a waiver of "all further notice and service," given after the expiration of the time within which service could have been legally perfected, will not prevent the dismissal of the writ of error. (R.)

Practice in the Supreme Court. Bill of exceptions. Service. Waiver. Before the Supreme Court. July Term, 1873.

When this case was called, counsel for defendant moved that the writ of error be dismissed, upon the ground that service of the bill of exceptions was not perfected until the expiration of more than ten days from the date of the Judge's certificate to the same.

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The bill of exceptions showed that it was signed by the Judge on January 24th, 1873, filed in the clerk's office on February 8th, and served by an acknowledgment on February 17th, 1873.

Counsel for plaintiff in error insisted that the acknowledgment of service cured the defect suggested. The acknowledgment was as follows :

"I acknowledge due and legal service of the within bill of exceptions, including brief of evidence thereto attached, marked "Exhibit B," and Judge's certificate, and waive all further notice and service. This 17th day of February, 1873.

(Signed)

"VASON & DAVIS,

"Attorneys for defendant in error."

And if this position was not sustained, he proposed to make affidavit to the following facts, to-wit: That he presented the bill of exceptions to Judge Harrell within thirty days from the adjournment of the term of Baker Superior Court, at which the rulings complained of were made; that subsequently, he inquired at the clerk's office and ascertained that the bill of exceptions had not been there received; that he then called upon Judge Harrell, who informed him that on the day of signing the bill of exceptions he had handed it to a Mr. Hawes, an attorney at law, to be delivered at once to the clerk; that he then saw Mr. Hawes, who took the bill of exceptions out of his pocket and handed it to him, Hawes having forgotten to deliver the same as directed; that on the day he received said paper from Mr. Hawes, he obtained the aforesaid acknowledgment of service thereon; that the date of filing in the clerk's office is erroneous, and should have been February 28th; that he has applied to Judge Harrell for a certificate as to the aforesaid facts, and he has failed to deliver it to him.

Upon this affidavit, counsel proposed to apply for a *mandamus nisi* against Judge Harrell, requiring him to show cause why he should not certify to the facts therein contained.

The Court ordered that the writ of error be dismissed,

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holding, upon the last ground urged by the plaintiff in error, that even if the facts justified a *mandamus nisi* against Judge Harrell, his application was too late under the twenty-ninth rule of Court.

BOWER & BOWER, for plaintiff in error.

VASON & DAVIS, for defendant.

MATHEW R. STANSELL, plaintiff in error, vs. JOHN LINDSAY et al., defendants in error.

1. When an administrator was sued in ejectment, and contracted with an attorney to defend the suit, and agreed to give him one-half the land if the defense was successful, and the attorney so employed procured another attorney to represent him at the trial, and the defense proving successful, the administrator sold the land under an order of the Ordinary, had it bid off for himself and the substituted attorney, and then divided the land between himself and the substituted attorney, and the attorney first employed filed a bill against the administrator, and the substituted attorney, for a specific performance of the original agreement:

Held, That it was not error for the Chancellor to charge the jury that a bill for specific performance would lie in such a case against the administrator and the substituted attorney.

2. As this turns entirely on the credibility of the witnesses, the testimony being strikingly in conflict, the jury was the proper tribunal to decide between the parties, and there being no error of the Court in its charge, the verdict ought not to be disturbed.

New trial. Equity. Specific performance. Witness. Before Judge HALL. Newton Superior Court. March Term, 1873.

Mathew R. Stansell filed his bill against John Lindsay and John J. Floyd, making substantially the following case:

During the first of the year 1861, complainant was employed as an attorney at law, by the defendant, Lindsay, as administrator *de bonis non* upon the estate of George Bell, deceased, to file a bill in equity against one Robert J. Hender-

son, as administrator upon the estate of Cary Wood, deceased, for the recovery of lot of land number two hundred and nineteen, in the ninth district of originally Henry, now Newton county, and to enjoin an action of ejectment for said lot in favor of said Henderson, administrator, against said Lindsay, as administrator. Said defendant, Lindsay, contracted to convey to complainant one-half of said land for his professional service should he prove successful in said litigation; should he fail he was to have nothing. Complainant, in pursuance of said agreement, filed said bill, returnable to the September term, 1861, of Newton Superior Court, and attended to said cause whenever anything was to be done, until the March term, 1866, of said Court. About the first of the year 1862, complainant moved from the county of Newton to the county of Sumter, and finding it inconvenient to attend to his unfinished business at so great a distance, he employed James M. Pace, Esq., a competent attorney, to represent him. At the March term, 1866, of said Court complainant being himself present, and finding that the cause aforesaid would not be reached, requested the defendant, Floyd, an attorney at law, to represent complainant in connection with Mr. Pace, in the future management of said cause, to which request the said Floyd most readily assented, proposing at the same time to represent complainant in any other unfinished business he might have in the said county of Newton. Complainant expressed a perfect willingness that said Floyd should charge for his services, which he declined to do for the sufficient reason that complainant had, before that time, represented him in the county of Sumter, and had, at the request of said Floyd, charged him no fee. At the September term, 1866, of said Court, said cause was tried, complainant being represented by said Pace, and the defendant, Floyd, and resulted in a verdict in favor of the defendant, Lindsay, as administrator as aforesaid, and a decree in accordance with the prayer of the bill. About the time of said trial, or shortly thereafter, said Floyd procured possession of the contract made by said Lindsay with complainant for fees, from said Pace, under the express agree-

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ment that it should be returned if complainant should object to his possession, yet, though notified of such objection he has persistently refused to comply with his said promise. Shortly after the decree aforesaid was rendered, said Floyd, under and by virtue of said contract, procured a division of said lot with the defendant, Lindsay, went into possession of the north half of the same, and has since received the rents, issues and profits thereof. Complainant has frequently called on the defendants and requested of the said Lindsay that he convey to him one-half of said land in accordance with his obligation, and of said Floyd that he surrender to complainant said original instrument, the possession of said land, with the rents, issues and profits thereof, together with whatever title he has obtained from said Lindsay. But defendants have refused to comply with the complainant's reasonable request, Lindsay saying that said obligation has never been surrendered to him, and that the title to said land is yet in himself, and said Floyd stating that he has already surrendered said obligation and obtained a title to one-half of said property, as well as the possession thereof, so that complainant is in doubt as to which of them he should proceed against, even if he had an unquestionable common law remedy against either.

Complainant waives discovery, and prays as follows :

That the defendants may be decreed to deliver up to be canceled any title deeds that the defendant, Floyd, has received from the defendant, Lindsay, under and by virtue of the instrument aforesaid ; that they may be decreed to turn over to complainant the possession of the north half of said lot of land, and to account to him for the rents and profits thereof ; that the defendant, Floyd, be compelled to turn over to complainant said original instrument, or to place the same under the control of this Court, and that the defendant, Lindsay, be held to a specific performance of his said contract, and that he be required to execute a title to complainant, in conformity therewith ; that the writ of subpœna may issue.

The defendant, Floyd, answered substantially as follows :

The action of ejectment referred to in the bill was origi-

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nally commenced against one Solomon Bell, the first administrator upon the estate of George Bell, deceased. Solomon Bell, as administrator, employed complainant and one Sanford W. Glass, partners, doing business under the firm name of Stansell & Glass, to represent the defense. But previous to this time, about the commencement of the year 1860, the said firm of Stansell & Glass formed a law partnership with the defendant upon the agreement that of the fees in all litigated cases in the county of Newton, he should have two-thirds. At the March term, 1860, at the special request of said Stansell & Glass, the defendant consented to take an interest in said ejectment case upon the terms aforesaid. The defendant, being the oldest and most experienced lawyer of the three, having carefully examined the titles of the contending parties, became satisfied that the defense could not be sustained at law, and advised the filing of a bill in equity for injunction and relief. It was accordingly determined between him and his partners to adopt this course. Before said bill was filed, Solomon Bell departed this life, leaving the administration upon the estate of George Bell in an unfinished condition, and in July, 1860, the defendant, Lindsay, was regularly appointed administrator *de bonis non*, and was subsequently made a party defendant to said action of ejectment. About January 1st, 1861, the defendant became Judge of the Superior Courts of the Flint Circuit, and therefore ceased the practice of the law. The partnership of Floyd, Stansell & Glass was consequently dissolved, the old firm of Stansell & Glass continuing business for a time. In August, 1861, a bill in equity was filed by complainant in the name of said Lindsay, administrator, signed "M. R. Stansell & S. W. Glass, solicitors for complainant." From an instrument now before him, the defendant is satisfied that the defendant, Lindsay, as administrator, did employ the complainant and S. W. Glass in said cause. Said instrument is as follows :

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"JOHN LINDSAY, administrator, vs. R. J. HENDERSON, administrator.

" Bill in Newton Superior Court.

"I have employed Stansell & Glass, attorneys, to represent me in a case between the above parties, concerning lot of land number two hundred and nineteen, in the ninth district of Newton county, it being the place whereon George Bell died. If said Stansell & Glass gain said land, they are to have one-half of the recovery for their fees. If they fail to recover, I am to pay them nothing further for their fees.

(Signed)

"JOHN LINDSAY.

"September 10th, 1861."

The term of office of the defendant having expired, his connection with the aforesaid litigation was renewed as follows: At the March term, 1866, of said Court, complainant came to this defendant in the Court-house, and said to him that the Lindsay case would not be tried at that term of the Court, and that he had determined to attend no future session; that he had turned over his business to James M. Pace, Esq., but that he was young and inexperienced in his profession and could not manage the Lindsay case; that defendant had once been consulted in reference to it, and he wished him to take the case as his own and manage it, and take the fee if there was a recovery, stating that the fee was entirely conditional, and that Mr. Pace had the contract, which he would get and turn over to defendant. Defendant replied that he would assist Mr. Pace in that case and in any other in which complainant was interested. The complainant replied: "No. Mr. Pace could do the defendant no good in that case. He has done nothing in it, and it is my wish that you should take the case and the fee." The defendant then said, that as complainant had drawn the bill, he was entitled to compensation for that service. The complainant replied, that the defendant had done him favors which more than compensated for that. The defendant then agreed to take the sole responsibility of the case and the conditional fee. Complainant proposed to get

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Lindsay's obligation for the fee from Mr. Pace. The defendant replied that as complainant was in a hurry to go home, and as Mr. Pace seemed engaged, it was unnecessary; that he presumed Mr. Pace would deliver to him the paper. From that time the defendant gave to the aforesaid litigation his attention, and was successful in recovering said land for the defendant, Lindsay. The only assistance rendered by Mr. Pace was in reading the questions or answers to a set of interrogatories used upon the trial. Soon after the decree was rendered upon the aforesaid bill, the defendant applied to Mr. Pace for the defendant, Lindsay's, obligation for fees. Pace delivered it to him with the request that should complainant object he would return said obligation, to which the defendant readily assented, as he had no doubt of complainant's consent. He paid to Pace \$25 00, which he claimed under his agreement with complainant. Mr. Pace never has called on the defendant to return said obligation, and he now has, in his possession, written evidence of the consent of Mr. Stansell, and but for such consent he would have returned the same upon any such request. After the termination of the aforesaid litigation, the defendant, Lindsay, as administrator as aforesaid, under an order of the Ordinary of Newton county, sold the land, recovered as aforesaid, at public sale, and it was bid off by one Archibald Belcher, for about \$626 50. This purchase was in fact for the benefit of the defendant, Lindsay, and this defendant. The land was subsequently divided by a line running east and west, defendant taking the northern half and the defendant, Lindsay, the southern half. Upon the defendant's paying the defendant, Lindsay, \$50 00, the difference in value of the two halves, said Lindsay delivered to him a memorandum in writing, as follows:

"John J. Floyd having given me his receipt for \$313 25, the one-half the sum for which the land was sold, is now entitled to a deed for one-half the said land, the said receipt being given to enable me to make my returns to the Ordinary. March 3d, 1868. (Signed) JOHN LINDSAY."

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The defendant went into possession of the north half of said lot, and has since retained the possession thereof. He has caused ditches to be dug for purposes of drainage, and the bottom-land to be cleared, but as yet has realized no profits from it. He has no conveyance from said Lindsay beyond the aforesaid writing. He denies that the complainant has rendered him any professional services in Sumter county. If he has, and will present a reasonable bill therefor, it will receive prompt attention.

The record fails to disclose any answer as having been filed by the defendant, Glass.

The evidence for the complainant sustained the case made by the bill, with the exception that on cross-examination the complainant, on being presented with the original instrument, signed by Lindsay, on the subject of fees, as set forth in the defendant, Floyd's, answer, admitted its correctness. He further stated that he was unable to say why the obligation was made to Stansell & Glass, or why he signed the name of Glass, or the firm name of Stansell & Glass to the bill, unless it was from habit, as they were partners for so long a time; that he sometimes signed the firm name in writing to his wife; that the said firm had been dissolved before the filing of said bill.

The defendant, Floyd, testified to the facts as set forth in his answer.

The evidence is omitted, as it simply consisted of a repetition of the facts alleged in the bill and answer. It was, therefore, exceedingly conflicting.

The Court charged the jury, in substance, that if they believed the charges of complainant's bill to be sustained by the evidence, they would be authorized to direct, by their verdict, a specific performance of the contract between the complainant and the defendant, Lindsay, for fees.

The jury returned the following verdict: "We, the jury, find for the complainant, and that defendants do execute to Mathew R. Stansell a deed to one-half of the land, one hundred and fifty acres, more or less, part of lot two hundred and

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nineteen, (219,) in the ninth (9th) district of said county, in accordance with the prayer."

The defendants moved for a new trial, because said verdict was contrary to the law and evidence, and because of error in the aforesaid charge.

The motion was sustained, and a new trial ordered. Whereupon the complainant excepted.

CLARK & PACE, for plaintiff in error.

J. J. FLOYD; A. M. SPEER, for defendants.

MCCAY, Judge.

1. We do not propose to discuss the evidence in this case. The two principal witnesses are directly in conflict upon the main facts of the case. They, too, are the real parties to the controversy; and the verdict of the jury, if there be no error of law, ought not to be disturbed by the Court. As we understand the case, the new trial was granted because the Judge, upon further argument, was of opinion that he had erred in his charge to the jury, in telling them that if they believed the complainant had made out his case, they were authorized to decree a specific performance. The new trial is granted on the ground that the original contract was one which the administrator had no right to make. This illegality of the contract is not because it was champertous, but because the administrator has, in this State, no power to charge the land with any such obligations.

We do not think there was error in the charge of the Court as the case stood. If there was a *bona fide* suit pending against the administrator for the land, we think he had the right to employ counsel to defend the title of the estate, and to charge the *corpus* of the estate with the fee. If the fee was reasonable, and a proper fee to be given, and it was fairly and *bona fide* charged on the land by written contract, we see no reason why it should not be enforced by specific performance.

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The heirs-at-law are not complaining of the charge. The present defendant sets up all his rights under this contract. He is estopped from denying its validity. He cannot claim under it and deny it. He cannot be hurt by this decree, except so far as he is compelled to give up what he claims under the contract. If the heirs-at-law have any rights, they will not and cannot go on him ; and if this contract was a fair and proper one, we think the heirs-at-law cannot complain. If the administrator could contract a debt for a fee, and bind the heirs for the debt, or bind their property in his hands, to-wit: the land for the debt, we see no sound reason why the contract should be illegal because he has done by express agreement what the law would enforce by reason of the implied agreement. In the case of *White vs. Denkins*, 19 Georgia, 285, this Court held that the *corpus* of a trust estate might be sold by equity to pay a fee for its preservation. The only question would be one of parties. But here the fact is that the title of the heirs has been divested by a sale. The plaintiff follows the land with his claim, charging the purchasers with notice.

2. As to the question of non-joinder, there is evidence, which the jury had a right to believe that the complainant was the sole contractor ; and that the introduction of Glass was a *mistake*. This was distinctly left to the jury to decide. If they believed the witness, they found rightly. We think they had a right to believe him ; and as we think the charge of the Court was not illegal, we reverse the judgment granting a new trial.

Judgment reversed.

RANSOM CLOUD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[BYRON B. BOWER, the present Solicitor General of the Albany Circuit, having been of counsel for the plaintiff in error in this case before his appointment, the Attorney General was directed by the Governor to represent the State.]

1. Where service of the bill of exceptions is made by a party or his attorney, such service must be authenticated by the affidavit of the person perfecting the same, on the original bill of exceptions, or attached thereto. (R.)
2. Where service of the bill of exceptions is made by a sheriff or a constable, the entry thereof by such officer on the original is sufficient evidence of the fact. (R.)
3. Service of the bill of exceptions, by leaving a copy thereof at the office of counsel for defendant in error, is insufficient. (R.)

Bill of exceptions. Service. Practice in the Supreme Court. Before the Supreme Court. July Term, 1873.

When this case was called, the Attorney General moved to dismiss the writ of error upon the following grounds:

1st. Because the entry of service upon the original bill of exceptions is signed by the attorney of the plaintiff in error, and there is no affidavit authenticating the same.

2d. Because the aforesaid pretended service purports to have been perfected by leaving a copy of the bill of exceptions at the office of the Solicitor General.

The only evidence of service upon the bill of exceptions was the following entry:

“Served the Solicitor General with a copy of this bill of exceptions by leaving the same at his office. January 31st, 1873. (Signed)

O. G. GURLEY,

“Attorney for defendant.”

The Court sustained the motion and dismissed the writ of error, enunciating the principles contained in the preceding head-notes.

N. J. HAMMOND, Attorney General, for the motion, cited Code, sec. 4199; *Coleman vs. Ransom & Co.*, 45 Ga. R.,

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316; Baber *vs.* M. & B. R. R. Co., 42 Ga. R., 300. As to return by attorney: Clark *vs.* Lyon *et al.*, decided January term, 1873.

GURLEY & RUSSELL; BOWER & BOWER, *contra*.

MARTUS B. WALKER *et al.*, plaintiffs in error, *vs.* JOHN C. ZORN, defendant in error.

[TRIPP, Judge, having been of counsel, did not preside in this case.]

1. Where land is levied on as the property of A, and is claimed by B under our claim laws, the pendency of the claim does not make it illegal for other judgment creditors of A to levy on and sell the land at sheriff's sale.
2. Pending an action of ejectment the plaintiff filed a bill in equity alleging that the defendant in the action of ejectment was insolvent, and that he had then in his possession certain bags of cotton and a certain lot of corn, made by him on the land, which land the bill charged belonged to the complainant. The bill prayed that the defendant should be enjoined from selling the corn and cotton, and that the same might be put in the hands of a receiver to await the result of the action of ejectment:

Held, That a Court of equity ought not to interfere in such a case. The complainant has no lien, and stands in no respect, as to said corn and cotton, better than any other creditor of the defendant.

Equity. Claim. Ejectment. Receiver. Judgment. Levy and sale. Execution. Before Judge BUCHANAN. Upson county. At Chambers. August 1st, 1873.

On November 11th, 1872, John C. Zorn filed his bill against Martus B. Walker, and his tenants, D. K. Walker and Peter Walker, making substantially the following case:

On November 1st, 1870, the "Grant place," in the county of Upson, was exposed to sale by the sheriff of said county, under an execution in favor of James R. Walker, against Nathaniel F. Walker, the father of the defendant, Martus B. Complainant became the purchaser of said property for the

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sum of \$3,565 00, and took a sheriff's deed to the same. At the time of said sale, the defendant, Martus B., was in possession of said property under a pretended deed from the said Nathaniel F., bearing a date anterior to the judgment under which the sale aforesaid was effected. Complainant charges that at the time of the execution of said deed Nathaniel F. was largely indebted over and above his means to pay the claim upon which said judgment was based, and which was then outstanding against him. He further charges that said conveyance was made with the view and for the avowed purpose of defrauding his creditors. Martus B. Walker went into possession of said property in January, 1867, while suit was pending, and just before judgment was obtained, and consequently the sheriff was unauthorized to dispossess him. Complainant was therefore compelled to commence his action of ejectment to obtain possession. This suit was commenced to the May term, 1871, of Upon Superior Court, against all of said defendants. Said defendant, Martus B., has received the rents and profits of said land for the years 1871 and 1872, of the annual value of \$2,500 00, for which he refuses to account. He returns no property except the above lands, and if he is allowed to control the crops from year to year, as he has done, complainant will be unable to collect whatever *mesne* profits he may recover. Said defendants are preparing to remove the cotton which said tenants were to pay for rent, to-wit: fourteen bales, with a view to selling the same; also thirty-eight hundred pounds of seed cotton, and sixty bushels of corn. Unless the defendants are restrained from removing, selling or otherwise disposing of said cotton, cotton seed and corn until the final hearing of said ejectment suit, which is now continued to an extra term of this Court, to-wit: the Wednesday after the third Monday in December next, complainant will be without remedy for the collection of his rents as aforesaid. Prayer for the writs of injunction and of subpoena.

The Chancellor, (James W. Greene,) ordered a temporary injunction to issue, and required the defendants to show cause

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before him, on the Wednesday after the third Monday in December next why the same should not be made permanent.

At the adjourned term of the Court above referred to, complainant amended his bill substantially as follows: He did not pray for the appointment of a receiver in the original bill, because he had expected a trial of said ejectment case at this term, but it has been continued, and is likely to remain in Court for a considerable time, and as the said cotton, cotton seed and corn may be easily destroyed, and are subject to many casualties, besides being fluctuating in value, it is important to the interest of complainant as well as of defendants that the same be placed in the hands of some safe, disinterested person to hold and make sale of as receiver. Complainant therefore prays the appointment of a receiver to take charge of said produce, with directions to sell the same at public or private sale, as may best comport with the interest of all parties, and to bring the proceeds into Court, with an account of his actings in the matter, there to remain subject to the final decree in this case.

The defendant, Martus B. Walker, on the hearing of the motion for injunction, produced his affidavit, the only material portion of which was to the effect that the "Grant place" had been levied on by an execution in favor of James M. Smith *vs.* Nathaniel S. Walker, and a claim filed by him, at the time of the levy of the *fi. fa.* under which the sale was effected, at which complainant became the purchaser.

Voluminous affidavits were produced upon points not passed upon by the Court, and are therefore omitted.

The injunction was ordered to issue as prayed for, so far as the cotton was concerned, and the receiver appointed to take the same in possession with authority to sell, etc. To this order the defendants excepted.

The judgment excepted to was rendered by Judge Buchanan of the Tallapoosa Circuit. It recites that the presiding Judge of the Circuit (Judge Hall, the successor of Judge Greene,) was disqualified.

POE & HALL; A. D. HAMMOND, for plaintiffs in error.

C. PEEPLES, for defendant in error.

MCCAY, Judge.

1. We do not care to go into the question of the title to the land in dispute. In the granting of the injunction, that was a question of fact for the Judge, and we should not interfere with his decision as an abuse of his discretion. We do not think the *mere* fact that there was a claim pending made the sale under another *fi. fa.* against the defendant illegal. It is only in a very loose sense that land levied on is in the custody of the law. There is no seizure in fact. If the effect is to make the land bring less at the sale, (though we do not see how this is so,) the injury, if one, is to the defendant in execution. If it drives the claimant to a multiplicity of suits and puts him to expense, he may, perhaps, file a bill to compel all to one issue. But this he has failed to do. And if the law, as it does, gives the plaintiff a right to levy and sell, it would be but a poor right if he must wait to see if some other person has or has not the same right. One may have it and the other not. We do not, therefore, think the sale, for this reason, illegal.

2. But we cannot sustain this injunction for another reason. The right of the plaintiff in ejectment to recover *mesne* profits is a simple right of action, like any other debt or claim he may have against the defendant. The relation of landlord and tenant does not exist. He has no lien on the crop above other creditors. He asks in this bill that certain cotton and corn, owned by the defendant, who, he says, is insolvent, shall be impounded, to await his final verdict. What is there here different from the case of any plaintiff, with a suit pending against a defendant who is insolvent? The prayer is, not that the land shall be put in the hands of a receiver, and rented in the interest of both, but that certain corn and cotton, the property of the defendant, shall be impounded. We do not

Allen *et al.* vs. Tison *et al.*

think this can be done. In *Cubbedge & Hazlehurst vs. Adams*, 42 Georgia, 124, this Court settled, as the rule, a contrary doctrine.

Judgment reversed.

JOHN H. ALLEN *et al.*, plaintiffs in error, vs. ISAAC P. TISON *et al.*, defendants in error.

1. The discretion vested in commissioners appointed for the purpose of changing the location of the county site, where they are authorized to act as they might deem best for the interest of the county, will not be interfered with unless abused.
2. Where an Act was passed by the Legislature in the year 1872, "for the removal of the county site of Lee county, to compensate the owners of real estate at Starksville, and for other purposes," the body of which was in accordance with its title, and in 1873 a second Act was passed, the title to which was as follows: "An Act to amend an Act to authorize the Ordinary of Butts county to issue bonds to raise money to build a Court-house, and to authorize the commissioners to remove the county site of Lee county, to issue bonds of said county to build a Court-house and jail at the new county site of said county of Lee, and for other purposes:"

Held, That the two Acts in relation to the county of Lee should be construed together as one Act; and thus construed, the removal of the county site of Lee county, and the provision for the payment of the cost of such removal, incident to the erection of the public buildings at the new site, cannot be said to be more than one subject matter as contemplated by the Constitution.

Injunction. County matters. Constitutional law. Before Judge CLARK. Lee county. At Chambers. October 17, 1873.

For the facts of this case, see the decision.

G. W. WARWICK; C. B. WOOTEN; L. E. BLECKLEY, for plaintiffs in error.

FREDERICK H. WEST; RICHARD H. CLARK, for defendants.

WARNER, Chief Justice.

This was a bill filed by Allen and others, tax payers of Lee county, praying for an injunction to restrain the defendants, as commissioners, acting under the authority of an Act of the General Assembly, passed in the year 1872, and an Act amendatory thereof, passed in the year 1873, from erecting a new Court-house at Wooten's Station, in said county, and to restrain them from selling or using the bonds of said county, to an amount exceeding \$10,000 00, and also to restrain them from using and appropriating any money arising from the sale of said bonds, except for the removal of the Court-house from Starksville and the erection of the same at Wooten's Station, and for the erection of a safe and proper jail. On hearing the application and the defendant's answer to the bill, the presiding Judge refused to grant the injunction prayed for, whereupon the complainants excepted.

1. The first section of the Act of 1872 appointed the defendants commissioners, and made it their duty to select some eligible place at or near Wooten's Station, in said county, upon which shall be located the public buildings of said county. By the second section of said Act, the defendants, as commissioners aforesaid, were empowered to remove or sell the public buildings in the town of Starksville in said county, and to cause to be erected at the new site selected by them a suitable Court-house and jail, and such other buildings as may be deemed necessary for the use of said county, and to make temporary arrangements for the holding of Courts, keeping the public records, documents and offices at such new site, and to do and perform all other acts and deeds necessary to accomplish the purposes aforesaid. The fourth section of the Act provides that the Ordinary of said county should levy and cause to be collected and paid over to said commissioners, when requested by them, a tax not exceeding fifty per centum, on the State tax for the years 1871 and 1872, to enable them to perform the duties required of them by the second section of the Act. By the amendatory Act of 1873, the commis-

sioners to remove the Court-house in the county of Lee, were authorized and required to issue bonds of the said county for the purpose of building a new Court-house and jail for said county, and the Ordinary of said county was authorized and required to levy and have collected, from year to year, an extraordinary tax to meet the interest and to take up said bonds as they may become due. One of the grounds of complaint is that the commissioners having removed the old Court-house from Starksville to the new site, there is no necessity for building another. The defendants reply that this was done merely as a temporary arrangement for the holding of the Courts, under the provisions of the Act of 1872, until a new and suitable Court-house could be built. The Act conferred upon the commissioners a large discretion in this respect, and authorized them to do as they might deem best for the interest of the county; they were clothed with the power and authority to act for the county and not the complainants.

2. Another objection is, that the Acts of 1872 and 1873 are void because they refer to more than one subject matter, and contained matter different from what is expressed in the titles thereof. The subject matter of the Act of 1873 is to authorize the counties of Butts and Lee to issue bonds for the erection of public buildings in the respective counties. The two Acts in relation to the county of Lee should be construed together as one Act. The subject matter of both Acts is the removal of the county site of Lee county, and to provide for the erection of the public buildings at the new county site, and to provide for the payment of the cost of such removal by the county. The removal of the county site of Lee county, and providing the mode of paying the cost of such removal incident to the erection of the public buildings at the new site, cannot fairly be said to be more than one subject matter, as contemplated by the Constitution, and that is all the original and amendatory Act contemplates. Nor does the original and amendatory Act, which provides for the removal of the county site of Lee county, when it provides the means of pay-

ing the cost by the county of the erection of the public buildings at the new site incident to such removal, contain matter different from what is expressed in the title thereof, as contemplated by the Constitution. The removal of the county site of Lee county, and providing for the payment by the county of the cost incident to such removal, relates to the same matter. It is also objected that it is not competent under the Constitution for the General Assembly to confer the authority on the commissioners to tax the citizens of Lee county; that the duty of imposing taxes must be conferred on the regular constituted authorities of the county. If we concede this to be so, still, the amendatory Act of 1873, which provides for the issuing of bonds by the county of Lee to build a new Court-house and jail at the new county site of said county, confers the unqualified power and authority on the Ordinary of Lee county, and he is expressly required to levy and have collected from year to year, an extraordinary tax to meet the interest and to take up said bonds as they may become due. If the original Act was objectionable as to the tax being levied by the Ordinary on the requisition of the commissioners, the amended Act cures it. In view of the facts of this case, as disclosed in the record, we find no error in the refusal of the Court to grant the injunction.

Let the judgment of the Court below be affirmed.

MCCAY, Judge, concurring.

1. Under the title of the Act of August 20, 1872, to-wit: "An Act for the removal of the county site of Lee county, and to compensate the owners of real estate at Starksville and for other purposes," it was competent for the Legislature to authorize the county site to be moved, to appoint commissioners to select a site, to authorize them to procure land, to lay off and sell lots, to build a Court-house, etc., etc., and also to provide for levying a tax to pay for the same.

2. An Act to require the Ordinary of the county to levy a tax to meet the expenses of moving the county site, when requested to do so by commissioners appointed in the Act to su-

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perintend and carry out the removal, is not in violation of the Article XXVII. of the bill of rights, authorizing the General Assembly to confer the taxing power on the "county authorities." Such commissioners are county authorities within the meaning of the Constitution.

3. According to the answer of the defendants the injunction was properly refused. The house built is in no fair sense the Court-house contemplated either by the Act or by the commissioners.

4. Whether the Act of February 21st, 1873, authorizing the commissioners of Lee and the Ordinary of Butts to issue bonds to build a Court-house in their several counties, is not an Act containing two subject matters. Quere?

5. As the bonds authorized by the Act have, as appears, been issued and negotiated and much of the money raised already expended, the injunction was properly refused whether the Act was constitutional or not.

SOLOMON T. BRIDGES *et al.*, plaintiffs in error, vs. M. L. THOMAS, administrator, defendant in error.

1. When on the trial of an affidavit of illegality to an execution, the Judge held the judgment to be dormant for want of an entry within seven years, and the next day the plaintiff sued out a *scire facias* to revive, and subsequently to this suing out of a *scire facias* he filed a bill of exceptions to the judgment of the Judge, but afterwards withdrew it: *Held*, That the pendency of the bill of exceptions could not be pleaded in abatement to the *scire facias*.
2. When a record is shown to be lost or destroyed, its contents may be proven by parol without establishing the lost or destroyed original.
3. The original papers, to-wit: the declaration, process, verdict and judgment in a suit do not cease to be records because they have not been recorded in the record book of writs in the Superior Court.

Judgment. Illegality. Bill of exceptions. Record. Lost papers. Before Judge BUCHANAN. Coweta Superior Court. March Term, 1873.

On September 6th, 1860, John M. Thomas obtained a judgment in Coweta Superior Court against Solomon T. Bridges, and Solomon T. Bridges, as administrator of John T. McKoy, principals, and George H. Page, security, for \$3,903 21, with \$463 72 interest to the date of judgment.

On April 15th, 1872, an execution issued from said judgment. The defendants made payments on said execution, as follows: On January 24th, 1867, \$1,500 00; on March 12th, 1869, \$2,000 00. On said last day, Thomas, in consideration of the amount then paid, and by way of compromise, entered an additional credit thereon of \$2,710 00, leaving due only \$500 00. There was no official entry on said execution from the day on which it was issued until April 5th, 1871, when the sheriff entered a levy upon the land of Solomon T. Bridges. Bridges interposed an affidavit to the effect that he desired to avail himself of the benefits of the Relief Act of 1868.

On March 28th, 1872, during the March adjourned term of Coweta Superior Court, the question was submitted to the Court as to whether the judgment upon which said execution was based was dormant. The Court held the judgment dormant, and directed the levy dismissed.

On the succeeding day, (March 29th, 1872,) M. L. Thomas, the administrator of said John M. Thomas, he having in the meantime died, instituted proceedings by *scire facias* to revive said judgment. Subsequent to this, but within thirty days from the adjournment of said term of the Court, said M. L. Thomas, administrator, presented to the presiding Judge his bill of exceptions to the aforesaid ruling. He certified to the same, and the case was carried to the Supreme Court.

On August 15th, 1872, the plaintiff in error withdrew the bill of exceptions. At the succeeding March term of Coweta Superior Court the issue upon the *scire facias* came on to be heard.

The defendants pleaded that the judgment could not be revived for the following reasons:

Bridges *et al.* vs. Thomas.

1st. Because said proceedings by *scire facias* were not commenced in time.

2d. Because two suits were pending at the same time, and the *scire facias* having been commenced last should be dismissed.

A. D. Freeman, the attorney for the plaintiff in execution, testified, that he and the clerk of said Court had made diligent search among the old writs to find the judgment sought to be revived, but had failed ; that neither was it to be found upon the record of writs.

John M. Mann, the clerk of the Superior Court who issued the execution, testified, that according to the best of his recollection, he had the judgment before him at the time he made out said *fi. fa.* ; that he never issued an execution except from the judgment ; that John M. Thomas brought the declaration to him, and he issued the *fi. fa.* from the judgment entered thereon.

The minutes of September term, 1860, of Coweta Superior Court were then introduced, showing the verdict upon which said judgment was based.

The original execution, with the entries thereon, was also introduced, and plaintiff closed.

The defendants relied upon the documentary evidence introduced by the plaintiff, and also an admission by the plaintiff as to the truth of the facts hereinbefore recited, as to the writ of error to the Supreme Court, etc.

The Court charged the jury, amongst other things, in substance, as follows : That the levying of the execution, and it being arrested by an affidavit of illegality under the Relief Act of 1868, was not such a proceeding as, together with the *scire facias* to revive the judgment upon which said execution was based, would constitute two suits pending at the same time for the same cause of action ; that *scire facias* to revive a judgment is not an original action, but the continuation of the suit in which the judgment was obtained.

The jury returned a verdict in favor of the plaintiff, and judgment was rendered accordingly. The defendants moved for a new trial, because said verdict was contrary to the evi-

dence, and because of error in the aforesaid charge. The motion was overruled and the defendants excepted.

POWELL & STALLINGS, by C. W. MABRY, for plaintiffs in error.

ALVAN D. FREEMAN, for defendant.

McCAY, Judge.

1. We are not prepared to say that the plaintiff might not sue out a *sci. fa.* to revive a judgment, even if he had a levy pending on a *fi. fa.* issued upon it. If the judgment be in fact dormant it can be revived, and we do not see how the existence of a pending levy can affect it. But at any rate when this *sci. fa.* was sued out there was no pending levy. The Judge had dismissed it. The filing of a bill of exceptions to that judgment some time after the filing of the application for, and issuing of the *sci. fa.*, could not make that illegal which was legal when done. If anything was illegal it was the filing of the writ of error after the plaintiff had accepted and acted on the judgment dismissing the levy: *Hand vs. Armstrong*, 36 *Georgia*, 267.

2. Upon proof that the original record was lost, the plaintiff had a right to prove the existence and contents of it by parol. We know of no rule requiring the party wishing to use a lost record to establish a copy. If established, it would necessarily be by parol; and as we have said, we know of no authority which compels a party to take that course. Mr. Greenleaf expressly says that a lost or destroyed record may be proven as other lost or destroyed papers: 1 *Greenleaf on Evidence*, section 509.

3. Whatever may be the effect upon third persons of the failure of the clerk to record in the book for the record of writs, the proceedings and judgment in a case in the Superior Court, we are clear that as between the parties the judgment remains a judgment, though not recorded. If the record is intended for any purpose other than the preservation of evidence of the judgment, there can be no such purpose intended

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as affects the rights of the parties as between themselves. The statute does not say that the judgment shall be void. There is nothing but a provision making it the duty of the clerk to record. No consequence is attached of a failure. As between the parties we can see no reason for any consequence. We think the Court was right, and that the plaintiff was entitled to his judgment of revival.

Judgment affirmed.

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124 626

THE MORAVIAN SEMINARY FOR YOUNG LADIES, plaintiff in error, *vs.* WILLIAM H. ATWOOD *et al.*, administrators, defendants in error.

An account was contracted and due in September, 1862. Administration was granted on the estate of the debtor in September, 1869—it not appearing in the record when he died. Suit was instituted on the account in October, 1871:

Held, That the action was barred by the statute of limitations of March 16th, 1869. Even though the plaintiff may not have been entitled to have brought suit against the administrator by the first of January, 1870—which we do not determine—the spirit and equity of the statute require that it should have been commenced within a period after twelve months from the grant of administration, which was equal to the time allowed by the statute for bringing suits on such debts, to-wit: from the date of the passage of the Act to the first of January, 1870.

Administrators and executors. Statute of limitations. Before Judge COLE. Bibb Superior Court. October Term, 1872.

The Moravian Seminary for Young Ladies at Bethlehem, Pennsylvania, brought complaint against William H. Atwood and Albert G. Butts, administrators of James R. Butts, deceased, on the following account:

BETHLEHEM, PA., December 20, 1869.

Estate of James R. Butts, Macon, Georgia, for Catharine Butts,

To Moravian Seminary for Young Ladies,

Dr.

For balance on account running from Sept., 1860, to Sept., 1862...\$675 84

Cr. By cash, November 26, 1866..... 300 00

\$375 84

The defendants pleaded the general issue and the statute of limitations.

The plaintiff, in its introduction of proof, showed that the defendants received letters of administration on the estate of James R. Butts on September 6th, 1869.

When the plaintiff closed, the defendants moved for a non-suit, upon the ground that the account was barred by the statute of limitations of March 16th, 1869, having accrued prior to June 1st, 1865. The motion was sustained and the case dismissed.

To this ruling the plaintiff excepted.

POE, HALL & POE, for plaintiff in error.

NISBETS & JACKSON, for defendants.

TRIPPE, Judge.

The Act of March 16th, 1869, requires that all actions on contracts which accrued prior to June 1st, 1865, should be commenced by January 1st, 1870. The debtor in this case had died before that day. The record does not disclose the date of his death. Administration was granted on his estate in September, 1869. From the passage of the Act until the period of limitation fixed therein, there were more than nine months. From the grant of the letters of administration to that period, there were but four months. By section 2548, New Code, administrators are exempt from suit until the expiration of twelve months from their qualification. The terms of the Act of 1869 would bar the right of action if it were not brought by January 1st, 1870. The section quoted of the Code, prohibited this action from being instituted *until September, 1870*. It was argued by defendant in error that the effect of the Act of 1869 is to repeal section 2548; that the action could have been commenced by the 1st of January, 1870, and, not being so brought, it is barred. Such a construction would involve other serious questions in this and similar cases. If the debtor, Mr. Butts, was dead at the pas-

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sage of the Act, there was at that time no administration on his estate. A contest over the administration might have delayed the grant of letters for several months until they were issued; no action, of course, could have been commenced. This would have reduced the short period of nine months and fifteen days allowed by the Act to a still smaller number of months, or possibly weeks, and thus present the question, whether that was a reasonable time. Short as was the period which was allowed, it would, in all cases, have been still less where the debtor was deceased at the time the Act was passed, or died between that period and the 1st of January, 1870, and, doubtless, in many instances such a construction would amount to a practical denial of justice.

We forbear, then, to hold that in this case the Act of 1869 required this suit to be brought by the first of January, 1870.

Since the judgment was pronounced in this case, it has been held by Erskine, Judge, in *Marsh et al. vs Burroughs et al.*, and in *Scott vs. the Same*, decisions in the Circuit Court of the United States for the Southern District of Georgia, at November term, 1873, that the Act of March, 1869, does not repeal the exemption given to administrators by section 2548, New Code. In the decision, a strong exposition is given of not only the injustice that a contrary ruling might produce, but that it would, in many cases, present serious constitutional questions, as to whether parties plaintiff would have a reasonable time allowed them for the prosecution of their rights. These times would vary from a few weeks to a few months, and it might be in some instances that no time was left, and that, too, without fault or *laches* on the part of the creditor. It would be a harsh judgment, that the great and important right granted to the representative of the estate of deceased persons by the section referred to, and which has been allowed for more than three-quarters of a century, should be taken away by implication.

It has been argued that all the essential purposes of this exemption might be secured by permitting or requiring the action to be brought within the time specified in the Act of

1869, and to stay proceedings until the expiration of the twelve months; that this would not deny to the representative any benefit embraced within the policy of the exemption, and would, at the same time, meet the great cardinal idea that led to the adoption of the Act of 1869, by putting persons on notice of these old debts, the parties to which had gone through a revolution, and which ought not to be permitted to linger any longer without some legal assertion and notice of the right claimed; that such debts stood in a peculiar *status* when death had swept off so many debtors and creditors and witnesses; and that it was the policy of that Act to require them to be at once, or at a very early date, notified to those against whom they were to be asserted; and that it would be but a prudent caution to permit the action to be instituted, with a proper stay of proceedings, so that the practical benefit of the exemption to administrators, etc., might be secured.

Be this as it may, we are satisfied that the action in this case was barred when it was commenced. It was not instituted by the first of January, 1870, nor within a period after the expiration of twelve months from the grant of letters of administration, which was equal to the time between the passage of the Act to the first of January ensuing. We think that it should at least have been brought by that time. This would have given the plaintiff until June, 1871. He did not sue until October thereafter, and is consequently barred by several months.

We fix that period because it gives just what the Act of 1869 allows to parties who held such claims. To say that the statute referred to does not control or affect this claim in any way, would be to say that the death of the debtor, though administration may have been had, as it was, would give the creditor three years instead of nine months. For if he is not affected by the Act this would be the result. There was no statute running against him until July, 1868. Only one year had expired to the probable time of the death of the debtor, or up to a period about six weeks before administration was granted on his estate, so that striking out the one year's ex-

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emption to the administrator, he would have had three years from September, 1870, or until September, 1873, to institute suit on an account contracted and due in September, 1862. This was certainly never intended, and yet the contrary to what we now hold would have that effect. The debt is clearly within the terms of the Act. A fixed period is declared within which action must be brought. If by any legislative bar, that time is covered so as to prevent suit, then it should be commenced within a like period after the removal of that bar.

This is the rule that applies in analogous cases. If a debt would become barred within six months from the time when administration is granted on a debtor's estate, provided he had not died, then the twelve months' exemption allowed the representative shall not count against it. But immediately thereafter the statute recommences running, and would be a bar after six months from that time. In *Addison vs. Christy & Company*, 49 *Georgia*, 431, it was held that under the eighth section of the Act of 1869 an account contracted and due on January 31st, 1866, on which suit was not brought until March, 1870, was barred, and that said Act operated so as to annul the effect of the various Acts suspending the statutes of limitation, and placed contracts made after June 1st, 1865, within the general law of limitations, as provided in the Code. If the debtor in that case had died, and administration had been granted, as in this, in September, 1869, then as four months would have barred the creditor had his debtor lived, he was entitled to the four months after the twelve months' exemption to the representative had expired. This would have given him until January, 1871. But had his account been made in January, 1865, and it was held that it did not come at all within the operation of the Act of 1869, he would have, as heretofore stated, until some time in 1873 to sue. This would produce the strange anomaly, that an account contracted and due in January, 1865, would require two years longer before it would be barred by the statute, than one due one year thereafter, provided that in both cases the

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debtors died between the time of the passage of the Act of 1869 and the 1st of January, 1870.

We think that upon principle, and the reason and spirit of the Act, we are sustained in the construction we give it.

Judgment affirmed.

CITY COUNCIL OF AUGUSTA, plaintiff in error, vs. BARNEY S. DUNBAR, defendant in error.

1. Bonds owned by citizens and residents of the city of Augusta on corporations, or individuals resident out of the city, are property within the city, so as to be subject to taxation by the city authorities, under their general power to assess a tax upon property within the limits of the city.
2. Under the laws of this State, a municipal corporation cannot levy a tax on the bonds issued by the State, even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State, itself, ought not to be presumed to have done in the absence of clear language so declaring.
3. Unless express authority to do so be granted by the Legislature, a municipal corporation has no power to enforce the payment of taxes due it by affixing a penalty of an additional *per centum* for failing to pay promptly when due.

Municipal corporations. Bonds. Taxes. Penalty. Before Judge GIBSON. Richmond County. At Chambers. June 4th, 1873.

The City Council of Augusta, by its tax ordinance for the year 1873, levied an *ad valorem* tax of one and one-third per cent. on all taxable property in said city, including in the list of said taxable property all railroad, municipal, or other bonds, (city of Augusta bonds excepted,) solvent notes and accounts, money loaned at interest, and all evidences of debt.

It was provided by said ordinance that all taxes should be payable within thirty days after the tax digest had been placed in the collector's hands for collection, and on all taxes unpaid

50	387
90	648
50	387
104	497
50	387
109	87

50	387
118	553
50	387
124	370
50	387
126	509
126	510

50	387
129	222

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after the expiration of thirty days, that there should be levied an additional tax of four per cent. ; on all unpaid after sixty days, five per cent. ; on all unpaid after ninety days, six per cent. ; on all unpaid on the first of September, seven per cent. ; on all unpaid on the first of November, execution, with ten per cent. added to the amount of tax, should be issued.

Barney S. Dunbar, a citizen residing in the city of Augusta, returned, under protest, the following bonds: Bonds of the Georgia Railroad and Banking Company, assessed at \$67,900 00; Central Railroad and Banking Company bonds, assessed at \$63,000 00; State of Georgia bonds, assessed at \$4,500 00, and bonds of the city of Macon, assessed at \$21,000 00. He then filed his bill to enjoin the city from collecting the tax, and alleged that said tax ordinance was illegal and invalid, upon the grounds that the obligors in the bonds were non-residents of Augusta, and therefore the property in these debts was not in the city; that the State bonds were not taxable by the city authority; and that the City Council had no right to levy the additional tax upon default in payment of the original tax.

The answer of the defendant did not vary the case made by the bill.

The Chancellor granted the injunction as to the Central Railroad and City of Macon bonds. To which ruling the City Council of Augusta excepted.

He refused the injunction as to the State bonds, the bonds of the Georgia Railroad, and as to the additional tax to be levied in case of delay in payment. To which ruling Dunbar excepted.

JAMES C. C. BLACK; W. H. HULL, for plaintiff in error, submitted the following brief:

Debts and choses in action are personal property: *Ford & Sheldon case*, 12 Coke 1; *Ryall vs. Rolle*, 1 Atkyns, 182.

Such property has in itself no locality; the fact of the paper being in a particular place makes no difference: *Morse vs. Morse*, 1 Brown's Chancery Cases, 129; *Fleming vs.*

Brook, 1 Sch. and Lef., 319; Chapman *vs.* Hart, 1 Vesey Sr., 273; 2 Wm's Ex'rs, 1015, *et. seq.*

The legislation of Georgia has always treated the residence of the creditor as fixing the *locus* of the property.

By section 798 of the Code, bonds, notes, etc., on parties in other States are taxable here; and while, by section 797, 800, all real and personal estate in this State is taxable, though owned by non-residents, yet no tax has ever been laid on debts due by residents to non-residents: Collins *vs.* Miller, 43 Ga., 338.

The laws and decisions of other States confirm the same views: Johnson *vs.* Lexington, 14 B. Monroe, 648; Johnson *vs.* Commonwealth, 7 Dana, 338; Thomas *vs.* Mason County Court, 4 Bush, (Ky.) 135; People *vs.* Park, 23 Cal., 138; People *vs.* Wharlenby, 38 Cal., 461; Latrobe *vs.* Baltimore, 19 Md., 13; Stephens *vs.* Booneville, 34 Mo., 323; Davenport *vs.* Miss. R. R. Co., 12 Iowa, 539.

The State of Pennsylvania has attempted to tax debts due to non-residents by residents; and in the case of the Cleveland, Painesville and Ashtabula Railroad Company *vs.* Pennsylvania, the Supreme Court of the United States decides that a State cannot do so.

The Court expressly base their decision on the ground that a debt, whether by specialty or simple contract, is property where the *creditor*, and not where the *debtor*, resides. That the Georgia Railroad and Banking Company is located in Augusta: See Acts of 1841, page 174. That State bonds are taxable is ascertained from the consideration: 1st. That there is no Act exempting them. 2d. That there are Acts exempting them in certain cases—as in trust investments—and the Act of the last Legislature, issuing certain bonds. 3d. That the State could forbid municipalities from taxing them, is certain, but until it does so, no such prohibition will be implied.

The remaining point is the power of the city to induce prompt payment by imposing an addition to the tax in case of delay. This rests on the general legislative power conferred on the City Council by the State; which power is only subject

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to the limitation of not being repugnant to the Constitution and laws of the land.

Act of 1798, section 3.

BARNES & CUMMING, for defendant in error, argued as follows:

We say, first, that the Court erred in holding that the corporation known as the Georgia Railroad and Banking Company has a residence in Augusta. Its charter does not fix its residence there. The residence of corporations created by the Legislature is a question over which the Legislature has power: 17 Ga., 333. But where it is not fixed they have no particular residence: 17 Ga., 331. This is shown from the manner of paying taxes direct to the Treasurer of the State. *Ibid.* Georgia Railroad pays its tax direct to the State: Act of February 1, 1850, cited 26 Ga., 659. And see as to residence of stock, the capital of the company: 26 Ga., 663. Neither can Georgia be said, geographically considered, or as a political body, to have a residence in Augusta. But State bonds cannot be taxed by the city, for if they could, the creature could impair the resources of the creator. If the right to tax exists in the city, it is a right which in its nature knows no limit: Dillon on Municipal Corporations, page 558. True, no express prohibition in the charter, restraining the city from taxing State bonds, but it exists by implication from the nature of things. No prohibition in the Constitution to prevent the General Government from taxing the agencies of the State, or the State Government from taxing the agencies of the General Government, but the prohibition exists by implication: Cooley's Constitutional Limitations, 480, 483 and note. The same reasoning applies more strongly to the case of a State and municipal corporation, for the latter has only such power as the former chooses to confer, and it cannot be said, in the absence of plain and unmistakable language conferring such a grant, that the State intended to bestow a power to weaken its resources and impair its credit.

The imposition of additional taxes in the form of penalties,

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is a new and unwarranted exercise of power. No such power has ever been exercised by the State. It is not granted by the city charter, and unless specifically granted, cannot be exercised: Dillon, page 576; Savannah vs. Hartridge, 8 Ga., 23.

The power to levy and collect the tax does not authorize a levy of a percentage for expenses of its collection: Dillon, 578; Jonas vs. Cincinnati, 18 Ohio, 318-323; Nelson vs. La-Porte, 33 Ind., 258. The right to impose a penalty for the non-payment of a tax must be plainly conferred, or it cannot be exercised by the corporation: Dillon, page 614-615; Municipality vs. Pauce, 6 La. An. 515, 1851. The imposition of the penalty is illegal further, because it is in violation of that provision in the Constitution requiring uniformity of taxation: Ames' Law Review, vol. iv., page 329; 44 Ill. 269; *Ibid.* 280. As all the classes of bonds.

The taxing power of the city of Augusta is a power confined to inhabitants or property within the city; 26 Ga., 663; Act of 1798 and Act of 1835, conferring powers of taxation.

Debts due by non-residents not within the city, and these bonds, all due by non-residents, are not taxable by the city: 23 Ga., 569; 33 *Ibid.*, 114. See, also, 14 B. Monroe, 648-661; Johnson vs. Lexington: 1 Bush, (Ky.), 381. See, also, Dillon, page 592-593; 2 Met., 228.

The case of Cleveland, Painesville and Ashtabula Railroad Company, decided by Supreme Court of the United States is cited *contra*. That was the case of a State tax. The State does afford protection to choses to action, but no protection is afforded by city government. The purposes for which the charter was given should be considered: 8 Ga., 29 and 30; 31 *Ibid.*, 715.

Unless the power be plainly given it cannot be exercised. Dillon, 576; 8 Ga., 23. In any event, the decision of the Supreme Court of the United States not binding on the State Court, neither according to Padleford, Fay & Co., vs. the City of Savannah: 14 Ga, 499, 506, 507; nor 37 *Ibid.*, 135-155; nor according to Cooley's Const. Lim., pages 12, 13.

The doctrine of *stare decisis* applies in Georgia: Cooley's Const. Lim., page 49; 35 Ga., 65-66.

In conflict between citizen and government as to legality of tax, the rule is a strict construction against the government: 8 Ga., 23.

McCAY, Judge.

1. The case of *Bridges vs. The Mayor and Council of Griffin*, 33 Georgia, 113, is clearly a decision that the locality of a chose in action, such as bonds, promissory notes, etc., is at the place of the residence of the debtor, and if that decision be now the law the Judge was right in granting the injunction as to the Central and Macon bonds. But we think the legislation of the State, since the date of this decision, clearly indicates that a different rule is now to be adopted. Under our tax laws, as they then stood, though choses in action were taxed, there was nothing in the tax Acts to indicate where the locality of choses in action was. It was, therefore, a question for judicial decision upon general principles. But by section 798 of the Code it is declared that "bonds, notes and other obligations for money on persons in *other States*, or bonds of the United States or of other States, or bonds of corporations of other States, and shipping, are subjects of return and taxation in this State." This can only be on the idea that the locality of such property is with the owner of it. It cannot be supposed that the Legislature intended to tax choses in action held by residents in this State on residents of another State, and at the same time tax, as it does, "all the property of non-residents which is in this State," including bonds and other obligations for money; section 800. This would be taxing property here and property not here; taxing debts against the creditor and the debtor, which is absurd and oppressive. In our judgment this is a clear indication and declaration of the legislative will that the property in bonds and notes, or other obligations to pay money, is located at the place of the residence of the owner of them, and that at least since the 1st of January, 1863, when the Code went into effect,

such is the law of this State for purposes of taxation. And this is, in our judgment, the correct rule, sustained by the current of decisions and by right reason. The analogy drawn between such choses in action and deeds to land or bills of sale to personal property, is hardly accurate. The latter are tangible, visible, and have a definite locality, because they occupy space, but choses in action are intangible, and in fact have no material, visible locality. As a general rule of law, for other purposes than taxation, they follow the person of the owner. They are bought, and sold, and transferred by him; they may be stolen, sued for, etc., by stealing or suing for the paper which represents them. There are some old decisions on the question of the wife's equity and right of survivorship indicating a different rule in such cases, especially of choses in action which cannot, at law, be transferred: See Bishop on The Law of Married Women, Title, Wife's choses in action. But the current of authorities, as to stocks, bonds and notes for money, very decidedly fixes their locality at the residence of the owner of them. At any rate, this is true under the authorities for purposes of taxation: Johnson *vs.* Lexington, 14 B. Monroe, 648; Johnson *vs.* Commonwealth, 7 Dana, 335; 4 Bush, (Ky.), 135; 23 California, 138; 38 *Ibid.*, 461; 19 Maryland, 13; 34 Missouri, 323; 12 Iowa, 539. And in Cleaveland and Ashtabula Railroad Company *vs.* Pennsylvania, at a late term of the Supreme Court of the United States not yet put into book form, that Court decides the same thing, both upon principle and authority: See, also, 43 Georgia, 336. We are, for these reasons, of the opinion that bonds and other obligations for the payment of money, have their locality with the owner of them, and that the Court erred in enjoining the collection of the tax on the Central Railroad and City of Macon bonds.

2. But we do not agree with the Court as to the right of the city to tax State bonds. It is not pretended that the State has granted this right in terms. It is a question of some doubt whether a State can tax its own bonds. At any rate it is a matter of serious question whether it is right to do so.

If a State contracts to pay a fixed interest on its bonds, it is rather a loose compliance with that contract to tax the bond one or two per cent. We will not say a State cannot tax its own bonds. But we do say that the presumption is, in our minds, very strong that a State has not conferred on another taxing power this right if there be no express words so declaring. The power of a municipality to tax State bonds is a power seriously to cripple the credit of the State—seriously to hamper her power to borrow money, and, in our judgment, such a power is not derivable from a mere general power to tax property.

3. We think, too, that the city has no grant of the power to assess the additional per cent. in case of failure to pay promptly. So far as the right of the city is to be gathered from the Acts published in the City Code, we find no specific mode pointed out how its taxes are to be collected. The general rule is, as laid down in the books, that if no specific mode is pointed out, the tax, when assessed, is a debt, and is only collectable as other debts: See Dillon on Municipal Corporations, on this subject, and the numerous authorities there cited. We suppose the city has heretofore adopted the mode used by the State for the collection of its taxes, to-wit: by distress and sale of the property of the tax payer, and perhaps the power to assess and collect a tax implies this, though there are cases denying even this right: See 30 Alabama, 461; 1 Hulst., (N. J.), 67; 3 Levintz, 281; 2 Maule & Sel., 60; see, also, Dillon on Municipal Corporations, sections 270, 287, 341, 355, 656, 657. The power in the city of Augusta to collect by distress and sale may, perhaps, also be fairly implied from the Act of incorporation and the amendments. It has, too, doubtless, been so long in use, unquestioned by the people or the Legislature, as now to have the authority of a presumptive grant. But we are not prepared to extend it. The right to enforce the ordinances by fine does not, we think, fairly include the right to assess a fine for the non-payment of a tax or other debt to the city, merely because that debt grows out of an ordinance. At common law all taxes by

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corporations and all fines were only debts, and were only recoverable by suit at law. At least, a tax is only a debt, and the power to collect it by a fine must be granted; it cannot be presumed.

Judgment reversed.

COLUMBUS M. PAYNE, administrator, plaintiff in error, *vs.*
THEODORE M. ELYEA, administrator, ANN E. ELYEA,
administratrix, *et al.*, defendants in error.

1. Payne sold a parcel of land in the city of Atlanta to Ragsdale, giving a bond for titles describing the land as being two hundred by four hundred and thirty feet, and containing two and one-third acres, more or less. Ragsdale having mislaid the bond, gave Willingham an order to Payne, for Payne to execute to Willingham a deed to the lot, stating it to be about two acres, without giving the boundaries. Under the order Payne executed to Willingham a deed referring to the order and making it a part of the deed, but described the boundaries as being four hundred by four hundred and thirty feet, and containing two acres, more or less, and reserving a street thirty feet wide running east and west through the centre. Willingham conveyed to Elyea, describing the lot as it was described in Payne's deed to him. On a bill filed by Payne against Willingham and Elyea to reform the deed on the ground of mistake, etc., alleging that he had only sold two and one-third acres to Ragsdale, being the east half of the block which contained four and one-third acres, setting out the foregoing deeds, order, and the bond, (which had been found,) and praying a decree correcting such mistake in his deed so as to make it a conveyance for the east half of said block, in accordance with the real contract between them, the jury found as follows: "We, the jury, find for complainant, and recommend that the deed be reformed, and that defendant, Elyea, had sufficient notice."

Held, That the verdict is not sufficiently certain and definite to fix the quantity and identity of the land intended to be conveyed so as to authorize a full, definite and final decree thereon.

2. On the trial of such a case, the complainant, Payne, is a competent witness on the issue of a mistake in his deed to defendant Willingham, although the co-defendant Elyea, the vendee of Willingham, had died since the filing of the bill, and his representative is made a party.
3. The portion of the answer of the witness, Payne, to the second interrogatory which was read to the jury, was not an answer to that part of

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the interrogatory which was objected to as leading, and was properly admitted. The third interrogatory was not leading—nor does the fact that a previous interrogatory was illegal because it was leading—make the balance of the witness' answers to other interrogatories incompetent.

4. The affirmance of the judgment of the Court below granting a new trial, is limited to the first ground specified in this syllabus, this Court being of the opinion that the evidence was sufficient to authorize a decree to reform the deed to Willingham, and that the verdict as to notice to Elyea was not so contrary to the evidence as to demand that it should be set aside on that ground.

Equity. Mistake. Verdict. Witness. Interrogatories.
New trial. Before Judge HOPKINS. Fulton Superior Court.
October Term, 1871.

Edwin Payne filed his bill against Benjamin V. Willingham and Charles H. Elyea, making substantially the following case: Complainant had previously been the owner of a lot of land in the city of Atlanta, containing four and one-third acres, more or less. In August, 1868, he sold the east half of this lot to one Ragsdale, and gave him a bond for titles, with the following description: "Commencing on the south-west corner of lot known as the Whaley brick-yard, at the distance of thirty feet from the said corner, and running west two hundred feet, and thence north four hundred and thirty feet to a fifty foot street, and thence east two hundred feet along said street, and thence south four hundred and thirty feet to the beginning, containing two and one-third acres, more or less."

Before this sale complainant had conveyed to George Gibbon one-half an acre off the south-west corner of the four and one-third acre block, of which the aforesaid land constituted a part.

By authority from said Ragsdale, complainant made the deed which he was obligated to make under said title bond, to Benjamin V. Willingham on the 24th of January, 1863. In this deed there is a mistake, the first and third lines in the descriptive clause of the deed being four hundred instead of two hundred feet, as it is written in the title bond; but the

number of acres is two and one-third, more or less, in the title bond, and two, more or less, in the deed. As appears by inspection, the length of lines in the bond makes but little more than two acres, while in the deed it makes four and one-third acres. The lines are just doubled on two sides of the lot. On the 4th of September, 1865, said Willingham sold the same land to Charles H. Elyea, and made him a deed. The length of lines is the same as written in the deed from Payne to Willingham, and the number of acres the same, to-wit: two acres, more or less. The consideration in the deed from Payne to Willingham is \$1,600 00 (Confederate money;) in the deed from Willingham to Elyea, \$525 00, (United States currency.) Elyea, before and at the time he purchased said two acres of land from said Willingham, had notice that the description in the deed from complainant to Willingham contained a mistake, and that said deed, as well as the one from Willingham to him, was only intended to convey two acres of land, more or less, instead of four and one-third acres, as the distances mentioned in said deeds would indicate. Complainant waives discovery. Prayer, that Elyea be enjoined from encumbering or disposing of the land in controversy until the further order of the Court; that the mistake in said deeds may be corrected, and that the writ of subpoena may issue.

Elyea answered said bill substantially as follows: Denies all notice of the mistake. When about to purchase, Willingham declined to go with him upon the land on account of the distance and the heat of the weather. He then went without him; after reading the deed, (meaning the one from Payne to Willingham,) and noting the boundaries as therein described, with this description as a guide, both as to distance and *direction*, he stepped off the land before purchasing it, and by this means formed his opinion of its position and value. Acting on the opinion thus formed, and without knowing or suspecting any error or mistake in the deed as to the said *boundaries*, he purchased and paid for said land. Defendant admits that there was a deed on record for one-half an acre of the four and one-third acres, but denies that he knew of it. This deed

is from Payne to Gibbon. He acknowledges the superiority of the title to Gibbon, and claims, in consequence thereof, indemnity from Payne for a breach of his warranty to that extent. The deed which Elyea had when he looked at the land before buying it, recites that it is to convey the same land sold to Ragsdale by title bond; also, recites the power of attorney made by Ragsdale to Payne, authorizing the latter to execute a deed to Willingham. He supposed that the deed covered the identical land mentioned in the bond.

The quantity of land mentioned in said power of attorney is two acres, more or less.

Pending the litigation Payne and Elyea both died, and their administrators were made parties. Payne died after his evidence had been taken.

The testimony introduced was substantially as follows:

Payne testified, that he sold only two acres to Ragsdale, and Willingham bought from Ragsdale the land mentioned in the bond to Ragsdale. He did not read over the deed before signing it; supposed it was all right, as he regarded Willingham as an honest man. He is satisfied Willingham made a mistake in describing the land four hundred feet by four hundred and thirty, he having sold him two hundred by four hundred feet, which was two acres instead of four and one-third acres.

Willingham testified, that he sold Elyea two acres more or less; he sold to Elyea the same land and no more nor less than he purchased from Payne. He does not recollect the boundary lines, and cannot say as to their lengths, but it was two acres. Intended to sell Elyea the same land that he bought from Payne. He thinks the land well sold at the price to Elyea, to-wit, \$525 00.

W. R. Venable testified, that he lives near the land, only an alley separating his lot from it. He bought an acre lot at that place in 1865, after the surrender, and paid \$600 00 for it. Thinks the land involved in the alleged mistake worth as much or more per acre than the lot of witness, because it lies more level.

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John R. Wallace testified, that he is a real estate agent in Atlanta; was engaged in that business in 1866. Knows the land in controversy, and thinks it to have been worth in that year \$600 00 per acre; sold land in the same neighborhood at that price.

John Whaley testified, that he was at work at Whaley's brick-yard when Elyea came to look at the land before purchasing it from Willingham. Elyea had with him Payne's deed to Willingham, and witness aided him in stepping off the land as described in that deed. They stepped four hundred feet one way and four hundred and thirty feet the other. At that time the whole lot was vacant, and it so remained until witness, by Elyea's permission, put up the frame of a small house on it. Witness never finished it, because he was informed that Gibbon claimed and had a deed to that part of the lot on which the building was placed. After this Gibbon died, and the half acre covered by the deed from Payne to him was sold by his executor and bought by Elyea. That half acre was a part of the tract stepped off by witness and Elyea, and was as valuable as any other half acre therein embraced. Witness thinks it was the most valuable, as it was the most suitable for building. Witness was at work in the brick-yard for Elyea when the latter gave him permission to build. Elyea stated that if witness would build the house and keep possession of the property, he might occupy the house as long as he wished free of rent. The brick-yard in which witness worked was opened upon the land in controversy, and has been used as such ever since by Elyea and his administrators.

The jury returned the following verdict: "We, the jury, find for complainant and recommend that the deed be reformed, and that the defendant, C. H. Elyea, had sufficient notice. November 15th, 1871.

(Signed)

"C. A. PIRTS, Foreman."

The administrator and administratrix of Elyea moved for a new trial upon the following grounds:

1st. Because the Court erred in admitting the evidence of Edwin Payne, objected to by the defendants on the ground that their intestate was dead.

2d. Because the Court erred in not excluding all of Payne's answer to the second direct interrogatory, objected to as leading.

Said interrogatory and answer were as follows: "Please look upon the annexed copy deed and state what amount of land was intended to be conveyed thereby? Was the land sold and intended to be conveyed by said deed a plat four hundred feet square, or two hundred feet by four hundred feet? At what price was it sold, and in what currency were you paid?"

Answer: "I have looked upon the annexed copy deed. [The amount of land intended to be conveyed was two acres more or less, as is stated in one portion of the deed, and not four hundred feet by four hundred and thirty feet. That four hundred feet by four hundred and thirty feet was put in the deed by mistake of the draftsman of the deed. It should have been two hundred feet by four hundred feet. I never intended to convey more than two acres more or less, as is recited in the deed.] I sold it for about \$1,600 00 in Confederate money. It was worth at that time, in good money, \$300 00 or \$400 00."

The portion of the answer included in brackets was excluded by the Court.

3d. Because the Court erred in not excluding Payne's answer to the third direct interrogatory, objected to as leading.

The said interrogatory and answer were as follows: "Was or was not the land described in the deed as being four hundred feet square, a mistake? If yea, in what does the mistake consist? If the whole four hundred feet was not sold or intended to be conveyed by said deed, how much and what portion of said land was sold, and intended by said deed to be conveyed?"

Answer: "The land described in said deed as being four hundred feet square was a mistake. The mistake consists in

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the number of feet. I did not sell four hundred feet square, but two hundred feet by four hundred feet. I do not now remember the boundaries. It was the same bargained to Mr. W. L. Ragsdale, for which I gave him bond for title. That bond calls for two acres, more or less."

4th. Because the Court erred in not excluding all the evidence of Payne, the whole of which was objected to at the trial upon the ground that it was affected throughout by the aforesaid leading interrogatories.

5th. Because the verdict is incomplete and does not dispose of the whole subject matter of the bill.

6th. Because the verdict was too vague and uncertain to be the basis of a full, definite and final decree.

7th. Because the verdict was contrary to the evidence.

The motion was sustained and a new trial ordered. Whereupon the complainant excepted.

COLLIER & HOYT, by P. L. MYNATT, for plaintiff in error.

By construction, the Court below arrives at the conclusion that the mistake is in the number of acres mentioned, and not in the length of lines, so that the purchaser buys and pays for two acres, but by legal construction he is informed that he got four. That this is not a proper rule of construction: See 1 Greenleaf's Evidence, section 301, note 2; *Lee vs. Hester*, 20 Georgia, 588; *Harrison vs. Talbot*, 2 Dana, 258; *Sugden on Vendors*, 201, 437; 1 Hilliard Ven., 309, 313, 318.

This is a patent ambiguity. If too uncertain for the intention of the parties to be carried out, then the instrument is void: 2 Phil. Ev., 749, (note;) *Keer on F. & M.*, 435; 2 Wash., on Real Estate, 628, 629. But the purchaser, Elyea, has notice by the deeds in his hands referring to the title bond and power of attorney, of the mistake, and how it was committed, and cannot therefore plead want of notice: 2 Phil. on Evidence, 741, 743; 3 Wash. on Realty, 367; *Allen vs. Bates*, 6 Pick, 460; *Fross vs. Crith*, 20 *Ibid.*, 121; *Vance vs. Fou*, 24 Cal., 444. Ambiguity explained by ref-

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erence to papers in his chain of title which he held in his hands, and is presumed to have seen them: Keer on Fraud and Mistake, 317, 236, 242, 240, 241, 250.

All the authorities agree that the cardinal rule is to ascertain and carry out the intention of the parties in the case of patent ambiguity: 1 Greenleaf on Evidence, section 301, note 2; 2 Phil. Ev., 746; Code, 2713, 2655; 3 Wash. on Realty, 349.

Payne was a competent witness. Elyea testified by way of answer. Reason of the rule as expressed in first exception to section 3798 of the Code ceases. Besides, the cause of action on trial was a mistake between Payne and Willingham, and Willingham is still living. Neither the second or third direct interrogatory of Mr. Payne was leading: Greenleaf Ev., section 434.

If interrogatories had been leading it would not follow that all witness' testimony on that subject should be excluded: Hasler vs. State, 20 Georgia, 155.

Verdict of the jury sufficiently certain, and covers the issue: Code, 3501, 3502.

L. E. BLECKLEY, for defendants.

Bona fide purchaser: Code, section 3064; Mutuality of mistake: Section 3069. Diligence: Section 3071. Innocent misrepresentation: Section 3117. Construction: Section 2715. More or less: Section 2600. Boundary: 16 Georgia Reports, 141; Schley's Digest, 116.

TRIPPE, Judge.

1. The verdict of the jury is too indefinite for a decree to be rendered thereon, so as to fix the identity or quantity of the land that would be conveyed under the deed, reformed as it would be by the decree. Certainly, reference would have to be made to something besides the verdict. Shall it be the pleadings or the evidence? If the pleadings, then portions of the evidence which could not have been disregarded by the jury, and which are necessary to be considered in getting the exact

boundaries of whatever land does pass, are to be laid aside. If it be the evidence, then portions of that is not fully consistent with other parts, and it was a matter for the jury to settle every fact necessary to reach the *exact* result required in this case, a result by which metes, and boundaries, and quantity are to be ascertained. If the pleadings and evidence are taken together as a guide, equally as great a difficulty would occur. The verdict should have directed wherein the reformation of the deed should be made, so that the decree by the Chancellor could be full and definite.

2. The Court did not err in admitting the testimony of Payne. Willingham, one of the defendants, was living, and the transaction testified to by Payne, was, as to what occurred between him and Willingham. He asks that his deed to Willingham may be reformed by a correction of a mistake alleged to have been committed between them. What effect the correction may have upon Elyea's rights as against Willingham, we do not say, if indeed it will have any. We only hold that as Willingham is a living party, and as the transaction proposed to be proven by Payne, was only what was the contract between them, Payne is a competent witness for that purpose.

3. The portion of the answer of the witness Payne to the second interrogatory, which was read, related exclusively to the price at which the land was sold in Confederate currency, and its value at the time of sale, "in good money." This was in answer to the last clause of the interrogatory, and stands unaffected, so far as we can see, by the fact that the *first question* in that interrogatory may have been leading. The first part was as to the mistake in the boundaries. The price or the value was another and an independent fact. The third interrogatory was not leading. If it does appear that the propounder may have expected an affirmative answer, to-wit: that there was a mistake, it suggests nothing to the witness, as to what or how much the mistake was. We see no impropriety in the question. If the second interrogatory be objectionable as leading, it does not vitiate the third. To so

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hold, would disable a party introducing a witness, if he once put a leading question from further examining that witness on that point.

4. We affirm the judgment of the Court below granting a new trial, on the ground of the indefiniteness or want of certainty in the verdict. We find no fault with it as being without sufficient evidence, either as to reforming Willingham's deed, or as to notice to Elyea : 14 New York Reports, (4 Kernan,) 143 ; 2 Dana, 258.

Judgment affirmed.

SECURITY LIFE INSURANCE AND ANNUITY COMPANY, plaintiff in error, *vs.* NANCY GOBER, defendant in error.

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1. William A. Gober made application to the Security Life Insurance Company, through its agent at Greensboro, for a life policy on his life in favor of his wife and children. The application sought a life policy for \$5,000 00, premiums payable annually. The application was dated 10th August, 1870. On receiving the application for transmission to the company, the agent gave to Gober a receipt, acknowledging the payment of \$99 15, the cash portion of the first premium, and stipulating that Gober was entitled to a life policy for \$5,000 00, as of the age of thirty-seven, if the company accepted his application, the company to be, in that case, bound from the date of his examination. If the company did not accept, the money was to be returned and the receipt canceled. There was, in fact, no money paid, but the agent took Gober's note for the \$99 15, payable to himself in six months. The company accepted the application and issued the policy, and sent it to the agent. The policy was not delivered to Gober, nor does he seem to have got formal notice of the acceptance of his application and the issue of the policy. The agent swore that he took the note as cash but that he did not intend to deliver the policy till the note was paid, though it does not appear that he informed Gober of this. The note was not paid at maturity ; but after it was due the agent demanded it, and informed Gober that if he did not pay he would lose his interest in the company. The policy was dated 29th August, 1870, and in it the premiums were declared due each year on that day, and if not paid the policy was to cease. Gober did not pay his note, nor did he pay the second premium. On the 16th of September, 1871, Gober died : *Held*, That whatever may be the liability of the company, under the facts,

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if Gober had died before the 29th of August, 1871, yet, as the company was only liable according to the policy, and as the second premium was unpaid, the insurance ceased after the 29th of August, 1871.

2. That Gober did not know the precise terms of the policy, if he did not, was his own fault, as he could have known had he applied to the agent for the same, and he was also charged with notice that the liability of the company for the second year was dependent on his payment of the second premium.

Insurance. Notice. Before Judge BARTLETT. Greene Superior Court. March Term, 1873.

Nancy Gober, widow of William A. Gober, deceased, both for herself and as next friend of the children of William A. Gober, instituted her suit in Greene Superior Court against the Security Life Insurance and Annuity Company, alleging in her declaration that said defendant was indebted to her in the sum of \$5,000 00, besides interest, on a receipt executed by said defendant on the 8th day of August, 1870, wherein said defendant, in consideration of a certain amount stated in said receipt to have been received by it, agreed to insure the life of the said William A. Gober for the sum of \$5,000 00, in accordance with his application made for insurance, provided said application was accepted; that said application was *accepted* by defendant; that the same was for the use and benefit of the said wife and children of the said William A. Gober; that the said William A. Gober departed this life on the 16th day of September, 1871, and that due notice was given and proof made to said defendant of the death of the said William A. Gober, and payment demanded and refused. The receipt sued upon, is as follows:

“SECURITY LIFE INSURANCE AND ANNUITY COMPANY,

“Numbers 81 and 83 Pine Street, New York.

“Received, August 8th, 1870, from William A. Gober, \$99 15, being the first annual cash part of premium on \$5,000 00 at age 37—which entitles the said William A. Gober to a life policy, in accordance with the application, for the sum of \$5,000 00, provided the application of said William A. Gober is accepted by the company; in which case, this

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receipt will be binding on the company from the date of the medical examination. If declined, the premium will be returned on surrender of this receipt.

(Signed)

“W. G. JOHNSON, Agent,
“Greensboro, Ga.”

The defendant filed the following pleas to the declaration: 1st. The general issue; and 2d, that no consideration in money was paid for the receipt, but that Gober only gave his note in payment of the receipt, with the understanding that if his application was accepted, the note was to be paid before he received his policy; and that he never paid said note, nor any premium; and that he never applied for his policy, but treated the same as a nullity, and would not have been entitled to anything, even if he had died within twelve months from the date of said receipt. That said contract was for the payment of annual premiums, and that if Gober had applied for and obtained his policy, the same would have been forfeited in consequence of his failure to pay the second year's premium, even if the first payment was valid.

When the declaration was read on the trial of the case, the defendant demurred. The demurrer was overruled.

The plaintiff introduced in evidence the receipt, and the interrogatories of Mrs. Nancy Gober, who testified that she was the plaintiff in the case, and the widow of William A. Gober, and that William A. Gober died on the 16th day of September, 1871, leaving seven children, (giving their names in full,) and that she had never been paid anything by the defendant; that William A. Gober went to pay off the note, but did not pay it; that he gave his note, and it was never paid; that she did not know whether Johnson had the note or not, nor whether he ever tried to get Gober to pay it; never heard Gober say so; that she did not know of Johnson's sending any word to Gober about paying the note, and never heard Gober say so. The plaintiff also proved by her attorney, William H. Branch, that he gave notice and proof of the death of William A. Gober to the defendant, and demanded

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payment of \$5,000 00; that the agents of the defendant admitted the acceptance of the application of William A. Gober, and that it was for the benefit of plaintiff; that he gave *the notice* to Dr. Townsend, and made demand on him and the defendant; that Dr. Townsend and Johnson were present; that he first demanded payment of Johnson, and then of Dr. Townsend, and that Dr. Townsend refused payment because second year's premium had not been paid; that Johnson had been dismissed from the agency before witness made the demand; that after the death of Gober, Johnson turned over the policy to witness; that when first asked about it, Johnson said it had not been issued, but soon after found it and said he had forgotten it, and that it had been in his drawer ever since its reception by him, and he had not thought of it from that day until then.

The plaintiff then introduced the application of William A. Gober for insurance, obtained from defendant on notice to produce, which showed upon its face that it was for a life policy, and that it was for the benefit of the wife and children of William A. Gober; that it contained the usual questions as to his health, statements of medical examiner, etc.; that it was recommended by W. G. Johnson, agent at Greensboro, Georgia, and accepted by the company on the 29th day of August, 1870, and that a policy was issued, (number twenty-six thousand five hundred and five,) which contemplated the payment of annual premiums in August, and that the application was of the same date as the receipt and medical examination.

The plaintiff closed.

The defendant introduced in evidence policy of insurance number twenty-six thousand five hundred and five, dated August 29th, 1870, which recited that, in consideration of the first annual premium, acknowledged to have been received by said company, as well as in consideration of the annual payment, by the 29th of August, of premiums, that said company insured the life of William A. Gober, for the sole use of his wife, Nancy Gober, and his children, in the amount of \$5,000,

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for the term of his natural life, subject to forfeiture upon the non-payment of annual premiums.

W. G. Johnson testified as follows: He was the agent for the defendant when the application was made. (Note for \$99 15, signed by Gober, was then shown to him.) He wrote the note; it has not been paid; the policy came after the application had been forwarded—about the 12th of September, after it was issued in August; had a conversation with Gober in December next thereafter, and told Gober if he did not pay up he would lose his rights in the company; Gober promised to bring cotton to Greensboro to pay his note, but never did so; never saw him but the one time; witness deposited the note with Storey as collateral, and raised money on it, and afterwards redeemed it himself; Gober lived about nine miles from Greensboro, and the contract was made at witness' mill, about seven miles from town; when witness had the interview with Gober, in December, note was over due from 1st October, but second premium was not due; in said interview, don't recollect whether or not he informed Gober that he (witness) had his policy; Gober never applied for it; don't know the custom as to notifying applicants of the arrival of their policies; witness sometimes did not; note was received by witness as cash, but he intended to hold the policy till note was paid; thinks it was the custom of the company to give notice when premiums were due; never gave notice to Gober that second premium was due; was not agent when second premium fell due.

The following note was introduced:

"\$99 15. By the first day of October next, I promise to pay W. G. Johnson, or bearer, ninety-nine 15-100 dollars, with interest, value received. August 8th, 1870.

(Signed)

"WILLIAM A. GOBER."

The defendant closed.

The plaintiff then amended her declaration as follows:
"That upon the acceptance of the application the policy of

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insurance was issued, containing conditions and stipulations different from said receipt or temporary policy of insurance; that the defendant failed and neglected to deliver said policy of insurance, issued as aforesaid, either to William A. Gober or to the plaintiff; that said defendant not only failed and neglected to deliver said policy as aforesaid, but failed and neglected to give notice either to William A. Gober or to the plaintiff, of the conditions contained in said policy; that, neither did the defendant give any notice either to William A. Gober or to the plaintiff, of the time when premiums would be due and required to be paid, it well knowing that it was the intention of said William A. Gober, and of the plaintiff, to pay said premiums whenever the same should become due."

The jury returned a verdict for the plaintiff for \$4,892 00, with interest from January 1st, 1872.

The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because of error in overruling the demurrer to the plaintiff's declaration.

2d. Because the Court erred in refusing to charge the following requests of defendant's counsel: 1. "That if the jury believe from the evidence that Gober knew Johnson had his policy and failed to call on Johnson for it, then Gober's ignorance of the requirements of the policy to pay his second premium at the time therein stated, will not prevent the forfeiture of the policy on account of its non-payment." 2. "That the policy being the property of the insured, it was his business to inquire and look after it, and if he failed to do so and was thereby damaged, it was his own fault, and those claiming under the policy cannot profit by his negligence." 3. "That if the jury believe from the evidence that the insured died after the expiration of the first year, without having paid the annual premium in accordance with the contract of the parties, then the plaintiff cannot recover."

3d. Because the Court erred in charging as follows, to-wit: "If the jury come to the conclusion, from the evidence, that

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William A. Gober, whilst in life, and W. G. Johnson, the agent of defendant, entered into the contract sued upon, and that Gober, for the use of plaintiffs, paid the agent of defendant the amount specified in the contract, and the agent of defendant received that amount, in a note on Gober, in payment of the first premium on his conditional policy of insurance, and that the agent accepted said note as payment, then it is as valid a payment of that amount as if the same had been paid in currency or coin. And if they should conclude from the evidence that William A. Gober complied with his contract by paying the first premium on his conditional policy of insurance, then the defendant was bound to comply with his part of the contract. And if the application of plaintiff for a life policy was accepted by said company (which fact of acceptance they must determine from the evidence) then the defendant was bound to comply with his part of the contract, and the plaintiffs were entitled to receive and demand of defendant a life policy in accordance with his application, for \$5,000 00, provided the application of said William A. Gober was accepted by said company."

"It was the duty of the company, within a reasonable time, to notify Gober of the acceptance of his policy for life insurance; if the same was accepted, to deliver him a life policy on said company for \$5,000 00, and if said defendant failed to deliver such policy without default of plaintiff, and plaintiff was damnified by such failure to deliver such policy, then plaintiff is entitled to recover."

"If defendant failed to notify plaintiff of the acceptance of said application and to deliver said policy, which it was the duty of defendant to do, then the plaintiff is not bound by the stipulations in such policy, and if damnified by such failure on the part of defendant to so notify said plaintiff, then the plaintiff is entitled to recover of the defendant the amount of such policy of insurance."

4th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the defendant excepted.

M. W. LEWIS; REESE & REESE, for plaintiff in error.

P. B. ROBINSON; JAMES L. BROWN; WILLIAM H. BRANCH, for defendant.

McCAY, Judge.

1. Whatever would have been the right of the plaintiff below, against the defendant, had Mr. Gober died during the first year after the date of either the application or the policy, we are clear that the liability of the company ceased on the failure to pay the second premium. The application, signed by the party applying, clearly sets forth that the payments were to be annual, and the insured had full notice that if his application was accepted his insurance would begin from the date of the receipt. When the policy was issued and transmitted to the agent, the company was bound according to the terms of the policy. But only according to its terms. One of those terms was that payment of annual premiums was to be promptly made as they became due; this was not done, and by the express conditions of the policy the liability of the company ceased. In the very nature of things this payment is a *sine qua non*—a condition precedent to the continuance of the risk. There are, of late years, non-forfeiture policies issued, but even these only continue the liability for what would be the surrender value of the policy. The risk ceases on the fixed amount nominated in the policy. That a company may, if it pleases, when the premium is due, not take advantage of the forfeiture; that it may, for its own convenience, notify the policy holder, and remind him of the day of payment or call upon him, through its agents for it, cannot change the rights of the parties. Why should an insurance contract be different from other contracts in this respect? It is a common custom for banks to notify debtors that their notes will be due on the day of maturity. This is a mere matter of convenience and not a necessity. Both parties to a contract are presumed to know its terms.

2. Nor is there, as we think, anything in the fact that Mr. Gober had never actually got his policy. It was in the hands of Mr. Johnson, the agent, for him. It was his duty to apply for it. If the receipt is to stand good until he *gets* his policy, he might refuse to take the policy, or go away, so that it could not be delivered. Obviously the business of life insurance would be impracticable on such terms. Mr. Gober knew that the policy was or was not to be issued in a short time. When that time passed, he was either insured or not insured. It was his duty to inquire. If he saw fit to lie still and consider himself insured because no application was made to him for the receipt, he had a right to do so; but only on the terms of the policy. By those terms, he was to pay promptly his annual premiums. He knew the receipt was only temporary, and that if his application was accepted, it would be by the issuing of a policy for a permanent contract. If he saw fit to let that lie in the hands of the agent, he must take the consequences of any want of knowledge he may thus have of its terms. He cannot, by this action of his, add to or detract from the terms of the policy. The very terms of the receipt are that the *first* annual premium only is acknowledged, and the application clearly notifies him of the same. This, too, is the common sense and common justice of the transaction. The funds of a life insurance company are the property of its patrons. The company is but a trustee for the persons—generally widows and orphans—who are to be the recipients of the money the company has; and, while the plaintiffs here have our sympathies, we must remember that the fund they are seeking is the property of other widows and orphans, and that it is the duty of Courts to see to it that justice be done to both parties.

Judgment reversed.

JOHN P. BRANCH, plaintiff in error, vs. THE MECHANICS' BANK, defendant in error.

Where a declaration was filed and process attached against a corporation, and a regular return made by the sheriff that the defendant was not to be found, and that the president of the corporation was dead, the plaintiff is not entitled after the lapse of five terms of the Court without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term, and to perfect service by publication under section 3870 of the new Code.

Process. Service. Amendment. Before Judge GIBSON.
Richmond Superior Court. October Term, 1872.

On December 29th, 1869, Branch commenced suit against the Mechanics' Bank for \$50,000 00, besides interest, on its bills. On the same day process was attached in the usual form. On May 28th, 1870, the sheriff of Richmond county made the following return: "The defendant, the Mechanics' Bank, not to be found, Thomas S. Metcalf, the late president, dead." At the October term, 1872, of said Court, when the docket was taken up on which said suit was entered, plaintiff's attorney filed his affidavit to the effect, "that before the service of said declaration and process on the said defendant, the president of said Mechanics' Bank, the proper officer on whom process should be served, died, and that said defendant had not then, nor has had at any time since, a public place of doing business, and has no individual in office upon whom service of process may be perfected, within the knowledge of this affiant." Upon this affidavit he predicated a motion that the Court order service by publication, as provided by section 3370 of the Code, the citation to require the defendant to be and appear at the next term of the Court.

The Court overruled the motion and refused the order. To this ruling the plaintiff excepted.

The presiding Judge, in addition to the usual certificate, certified that there was no one that he knew of upon whom to serve a copy of the bill of exceptions.

50	413
100	223
50	413
100	567
50	413
110	527
50	413
127	467

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HENRY W. HILLIARD, for plaintiff in error.

1st. A suit is commenced in the Superior Courts of Georgia by filing the declaration in the clerk's office.

2d. A suit commenced in the Superior Courts of Georgia continues until disposed of by trial or some order of Court, made in proper form, dismissing it.

3d. It is within the power of the Court, and its duty, to make all orders which tend to the advancement of suits commenced within its jurisdiction, that the ends of justice may be attained: Code, edition of 1873, sections 3332, 3333, 3370, 8250; 22 Georgia Reports, 259; 37 *Ibid.*, 32, 397; 3 *Ibid.*, 23; 27 *Ibid.*, 263; 35 *Ibid.*, 269.

W. H. HULL, representing, not the corporation sued, but parties ultimately interested, as *amicus curiæ*, submitted the following brief:

By the common law, on return of *non est inventus* to a writ, an *alias* and then a *pluries* might issue as often as was necessary; provided, that each new writ should bear test on the day the former was returnable—that is, it must issue during the term, which was considered one day: Touchins' case, 2 Salkeld, 699, side-page; Willett vs. Archer, 1 M. & R., 317, (17 E. C. Law Rep., 673;) 1 Tidd's Practice, 147, 152, side-page. The uniformity of process Act (2 Will., 4, 1832,) allowed new writs after the expiration of the former, but not to avoid the statute of limitations: See the Act and cases cited in Harrison's Digest, vol. 3, p. 5475, 5480. No statute of Georgia has changed the common law on this point. It will hardly be contended that this motion could have been granted under the Act of 1799: Munford vs. Bank of St. Mary's, 6 Ga., 44. But the case of White vs. Hart, in 35 Ga., 269, is relied on to show a change in the law. That case differs from this, in two important particulars: First. That had a standing in Court, by service perfected on one of two joint and several contractors; and it was consistent with long usage and with former decisions of this Court, to allow time to perfect service on the other. By service on one, the Court had ac-

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quired jurisdiction: *Lamar vs. Cottle et al.*, 27 Ga., 265. Indeed, there is little doubt that if Hart had not been sued originally, he might have been made a party by amendment: *Beasley vs. Allen & Stanford*, 23 Ga., 602. In the case at bar no one had been served, and the Court had not jurisdiction: *Ballard vs. Bancroft*, 31 Ga., 503. Second. In *White vs. Hart*, the motion was made *without delay*. Suit was brought to March term, 1866, and the motion was made September term, 1866, with proof that the residence of Hart was not known to plaintiff or his attorney *until after* March term. In the case at bar suit was brought to June term, 1870. The sheriff's return was May 28th, 1870; and this motion was made, without any excuse for delay, at October term, 1872—five terms having lapsed without action. Any motion for new service should, therefore, have been denied on its merits: *Lloyd & Wells vs. Welch*, 35 Ga., 104. But *this* motion could not be granted by the very words of the statute under which it is made: Section 3370 of New Code. The mode of service allowed in that section may be used in a new suit, but not in this suit; because the publication under it must be made "three weeks prior to the Court to which the *complaint* (not the process,) is returnable;" which, in this case, was June term, 1870.

TRIPPE, Judge.

Five terms of the Court had passed after the filing of the declaration and the return made by the sheriff of *non est inventus* and of the death of the president of the corporation. In the meantime no step whatever had been taken by the plaintiff. At the sixth term the motion was made to perfect service under section 3370 of the new Code. This, of course, involved the necessity of amending the process, or rather the issuing of a citation by the clerk, as required by that section. No legal reason was shown for such long delay. In fact none whatever has been given. It was stated in the argument that the case had been continued from term to term. We understand this to mean that by operation of law the case stood

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continued from the fact that no entry was made on the docket or minutes. The record shows none. Indeed, where there are no parties, it cannot properly be said there was a case having such a standing in Court as to be the subject matter of a continuance. There is really nothing to continue—no party in Court to be heard on a motion for that purpose. By the term *continuance*, it is intended to refer in the foregoing use of that word to those *continuances* of cases when they are called for trial, on special cause shown, and not to the technical continuance of an action in Court, by means of an *alias* and *pluries* writ, under the English practice.

It was claimed in the argument by plaintiff in error, that when the declaration was filed in the office of the clerk, it was a commencement of the suit. This is conceded: Code, section 3333. But we understand by this that when the suit is perfected by service on the defendant then its commencement shall date from the filing of the declaration, which is ascertained from the indorsement by the clerk. Without service it amounts to nothing. It would scarcely be contended that a plaintiff, whose right of action lacks but a few days of being barred by the statute of limitation, could, by simply filing his petition in the clerk's office, with the clerk's entry thereon, and then dismissing it without service, gain six months longer time to recommence an action for the same cause.

Upon an examination of the different cases which have been before this Court, and the decisions which were referred to by counsel for plaintiff in error as being favorable to the judgment he now invokes, it will be seen that in each of them there had been service on the defendant, or one of them, when there were two. In the case of *White vs. Hart et al.*, 35 *Georgia*, 269, which was chiefly relied on, both defendants had been served when the motion in the Court below was made. The motion was also made at the second term, and a good reason shown why the necessity for the amendments asked for had occurred. The plaintiff had shown diligence, and had, even without an order, as soon as he had learned the residence of one of the defendants, caused him to be served. It is true

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Judge LUMPKIN used the strong expression in pronouncing in that case, in reference to amendments and perfecting service, that "relaxation and not stringency is the rule now." But this was not intended to be taken in the broad sense sought to be given to it; for he further says, in immediate connection therewith, "so that now, if there be a legal cause of action set out in the declaration, and *the defendant has had notice of the pendency of the suit*, all other objections are to be disregarded, by so amending the proceedings as shall subserve the ends of justice;" New Code, 3345. In *Ballard vs. Bancroft*, 31 *Georgia*, 503, it was said, "the delivery of a copy of the process, with a copy of the petition to the defendant, is essential to perfect service, and to give the Court jurisdiction of the case," and this was made one of the head notes in that case. It is true, the motion was to dismiss the case, because the defendant had not been served with a copy of the process; and the dismissal was ordered by this Court. The decision is referred to, for the purpose of showing how far Courts have gone in holding that service is one of the essentials to give jurisdiction.

The observations made by HARRIS, Judge, in delivering the opinion in the case of *Loyd & Wells vs. Welch*, 35 *Georgia*, 104, and which seems to have had the sanction of the whole Court, are very significant, and bear strongly on the point under consideration. The suit was returnable to November term, 1865, and no service was made until May, 1866. At the judgment term, a motion was made to dismiss for that cause. The motion was refused and plaintiff allowed to amend the process so as to make it correspond with the sheriff's return. Judgment was rendered for plaintiff. The defendant entered an appeal, and, also, sued out a writ of error to this Court. A motion was made to dismiss the writ of error on the ground of the pendency of the appeal. In sustaining the motion to dismiss, it was said: "We are precluded from considering whether the Court exercised a sound discretion or not in allowing the process of the Court, which issued unquestionably correctly, in which there was no error and was

according to the truth of the case, to be amended so as to make the date of its issue conform to the service of the sheriff in May, 1866—months after the period had expired, when, according to law, the writ should have been returned to office.

We regret this, as it would have furnished a proper case in which to have given an expression of opinion as to *whether there are not rational and legal limits as to amendments*, under our statutes; what amendments are matters of course, and what are not." This was by the same Court, and at the same term, when *White vs. Hart et al.*, was decided.

We are fully aware of the great liberality allowed by law, and as shown by many of the decisions, as to amendments both of declarations and process, and, also, as to perfecting service; but we do not think that any statute or decision has gone so far as to permit a plaintiff to file his petition, and after a return of no service by the sheriff, to await the expiration of five terms without any action whatever, and then, without any legal cause shown for the *laches* or delay, ask to be permitted to do that which could as well have been done, and should have been done more than two years previously. It would be practically an avoidance of the statute of limitations, and would be in utter variance with and a total departure from all law and rules which exact diligence and condemn *laches* and neglect.

Judgment affirmed.

JOSEPH A. ANSLEY *et al.*, plaintiffs in error, vs. WILLIAM A. WILSON, trustee, defendant in error.

1. In order to pass the title to land by a sale by the city marshal of Americus, under a *fi. fa.* for city taxes, it is necessary that all the requirements of the city charter should be fully met, and if there be a failure to advertise the sale for thirty days, as required by the charter, the sale is void.
2. A levy upon land in this State is made by an entry by the levying officer upon the *fi. fa.*, and an entry by a city marshal on a city tax

50	418
89	286
50	418
91	508
50	418
d109	646
50	418
110	532
50	418
115	452
50	418
120	236
120	237
50	418
122	516
50	418
128	340
50	418
130	620

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fi. fa., "Levied this *fi. fa.* on a house and lot of the defendant, situated in the eastern part of the city of Americus, to satisfy the within," is not a sufficiently definite entry to give the marshal authority to sell a lot which the defendant happens to own in that part of the city; nor can such an entry by a city marshal be amended after the sale by adding a description sufficient to identify the property intended to be seized.

Municipal corporations. Tax. Levy. Description. Advertisement. Before Judge CLARK. Sumter County. At Chambers. May 10th, 1873.

William A. Wilson, as trustee for his wife and seven minor children, filed his bill against Joseph A. Ansley, N. A. Smith and J. C. Hogue, marshal of the city of Americus, making, in brief, the following case:

Complainant is the owner of twenty acres of land in the city of Americus, whereon there are two dwelling houses and other valuable improvements. Said property is worth at least \$5,000 00, and constitutes almost the entire estate of his *cestui que trusts*. On February 26th, 1873, all of said property was levied on under a tax execution for the sum of \$30 00, in favor of the city of Americus, against complainant, as agent for his wife, and the following entry made on said *fi. fa.*:

"I have this day levied on one house and lot of the defendant, situated in the eastern portion of the city of Americus, to satisfy the within *fi. fa.* February 26th, 1873.

(Signed)

"J. C. HOGUE."

This levy was advertised for the first time in a newspaper known as the Sumter Republican, on March 4th, 1873. The property was sold on the first of April, 1873, not having been advertised thirty days, at public outcry, to the defendants, Ansley and Smith, for \$96 00. Complainant has tendered to the defendant, Hogue, the amount due on said execution, and to the defendants, Ansley and Smith, the amount of their bid, with ten per cent. added, but they decline to receive the same. Complainant here makes the same tender; waives discovery

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and prays as follows: That the writ of injunction may issue, enjoining said Hogue, city marshal, as aforesaid, from executing any deed or conveyance to said property to the defendants Ansley and Smith, and from attempting to place said defendants in possession of the same, and from interfering with complainant's use and enjoyment thereof; that said pretended sale be set aside and complainant be allowed to satisfy said tax execution by the payment of the amount due thereon; that the writ of subpoena may issue.

The answers of the defendants and the affidavits read on the hearing of the motion for injunction did not affect the allegations of the bill in reference to the points decided, except so far as they showed that complainant had actual notice from the marshal of said levy and intended sale.

The Chancellor ordered the injunction to issue in the penal sum of \$4,000 00, upon the complainant's depositing in the clerk's office the amount due for city taxes, with costs of levy and sale, within ten days from the date of such judgment. To which decision the defendants excepted.

C. T. GOODE; B. H. HILL & SON, for plaintiffs in error.

1st. The fact of the absence of two days' advertisement did not affect the sale, as the city laws were substantially complied with: Code, sec. 4; 25 Ga. R., 103. Marshal's sales are governed by the same laws that govern other judicial sales: Code, sec. 2586. The old distinction was based upon the rules governing *fi. fas.* issued by Courts of limited jurisdiction: 11 Ga. R., 428. This property was bound for taxes: 8 Ga. R., 480; 4 Abbott's Nat. Dig., 259. Under section 893 of the Code, the rights of the purchaser are clear. He had nothing to do with the parceling of the property levied on: 40 Ga. R., 39.

2d. The case in 42 Georgia Reports, 629, does not affect this litigation.

3d. The right of redemption did not exist: 40 Ga. R., 50; sec. 31 of Act of incorporation of the city of Americus; Ordinances, p. 11, 33; 40 Ga. R., 39; Code, sec. 2577.

4th. Injunction will not lie to restrain trespasser: 11 Ga. R., 294; 8 *Ibid.*, 118; 5 *Ibid.*, 576.

HAWKINS, GUERRY & HOLLIS, for defendant.

1st. Right of redemption exists: Code, sec. 892 to sec. 895.

2d. Marshal has no authority to put purchaser in possession: 40 Ga. R., 49.

3d. The sale was in violation of law and of the city charter: 29 Ga. R., 56; 11 *Ibid.*, 423; 3 U. S. Dig., p. 376, secs. 426, 427; 4 Peters, 349.

4th. The levy was grossly excessive, and the sale therefore void: 25 Ga. R., 103; 3 U. S. Dig., p. 377, sec. 464.

5th. The description in the levy is too uncertain: 42 Ga. R., 629.

6th. Injunction is the proper remedy: Code, sec. 3153; 40 Ga. R., 293; 11 *Ibid.*, 246; 22 *Ibid.*, 165; High on Inj., sec. 370.

McCAY, Judge.

1. Admitting (which we do not decide) that a good case is not made in this bill for an injunction against the *trespass*, because there may be a legal remedy, still, we think the complainant has a right, if the charges in his bill be true, to an injunction against the making of a deed by the marshal. A Court of equity has original, and formerly had exclusive, jurisdiction for such a purpose as that. It will prevent the parties doing what will complicate the title, and add a new or denser cloud to the blur which this sale casts upon the complainant's title. Besides, this bill shows that this is a trust estate, and a Court of chancery will not be backward to interfere to protect the beneficiaries, if they are about to be injured. True, if the trustee has acted so as to pass the title, the Court will follow the law, but it would be a very rare case where a Court of chancery would decline to protect a trust estate, and send the trustee to his legal redress. The rule that a complainant must come into equity with clean hands does not go so far as

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to prohibit a Court of equity from giving its aid to a bad or a faithless man. The dirt upon his hands must be his bad conduct *in the transaction complained of*. All complainants in equity are human beings, full of faults and sin, and I doubt if there is one case in ten in which the complainant is not somewhat to blame. If the complainant does equity himself, or offers to do it, (except in those cases where the rule *in pari delicto*, etc., comes in,) his hands are as clean as the Court can require. "He who asks equity must do equity," is the maxim on which the expression as to "clean hands" is based. The right to seize and sell a man's property for his failure to perform a corporate duty, is the exercise of a high function that can only be justified by express law, and that law must be strictly construed: 20 *Georgia*, 639; 25 *Ibid.*, 103; 31 *Ibid.*, 700; 11 *Ibid.*, 423. So far, indeed, does this rule go, that the text books lay it down that a power to a corporation to levy and collect a tax does not include a power to seize and sell, and that the corporation can only collect by suit: Dillon on Corporations, section 656, and the cases cited. This Court in 40 *Georgia*, held that a marshal could not put the purchaser in possession, unless expressly authorized.

We see nothing in the sections of the Code alluded to, to-wit: sections 890 to 901, Code of 1873, to justify us in saying that they apply to marshal's sales. Were they negative Acts, that is, Acts putting new restrictions on tax sales, we should incline to apply them to corporation tax sales where the charter was silent; but as they are claimed to *extend* and *enlarge* the effect of tax sales we think it would be a violation of all rules of construction to give these sections that meaning. The defendants then must stand on the charter. The title passes only when the charter is complied with. 1st. There must be an execution regularly issued under the charter. 2d. There must be a seizure of the property, and these are necessary to get *authority* to sell; and, still further, the other requirements of the charter must be complied with. Without these the sale is, in our judgment, *void*, according to the universal tenor of the decisions. See the rule stated and the authorities in

Dillon on Municipal Corporations, section 658, and this, previously to the Code, was the ruling of this Court as to all sales, for taxes: 25 *Georgia*, 163; *Brooks vs. Rooney*, 11 *Georgia*, 425. Under this rule the bill, answer and exhibits show what? 1st. That the marshal levied on "a lot in the eastern part of Americus, as the property of the defendant." We think the *levy* wholly insufficient. It does not pretend to describe the property, except that it is in the eastern portion of the city. The charter makes the city four square miles in area. How is any one to know what property is levied on? The defendant in the *fi. fa.*, as appears in the answer of the marshal himself, has two lots in that portion of the city. Indeed, it is a necessity of the defendant's case to show there were two lots, since it is obvious that if *all* the complainant's property was intended to be levied on, the marshal violated the law in the sale by not putting it up in parcels. Had the whole twenty acres been included in the levy, it is not pretended that the small house and the land in its immediate vicinity would not have paid the tax. The levy does not give any description of the property, except that it is levied on as the property of the defendant. There is even no reference in the levy to any outside means of knowing what property was intended to be levied on. The levy is part of the authority to sell. Until there is a levy there is *no sale*, even by a sheriff, under *judicial process*. In this State land is not, in fact, taken possession of by the levying officer. The levy consist in the *entry* on the *fi. fa.* We doubt even if a levy on land could be amended, if essentially defective. If there were a sufficient entry to show that it was the intent of the officer to devote a particular, defined portion of land to sale, perhaps matters of form, as the date, etc., might be added by amendment. But an entry of this sort is more than a *return*, stating what the officer has done. It is the thing itself. The entry is the seizure. It takes the place of the manucaption of personal property. Could the failure to seize personal property be remedied by an amendment?

2. We do not think we are called upon in this case to con-

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strue sections 893 and 895 of Irwin's Code, except to say that they do not apply to sales by the marshal of a town or city. They do not so apply in terms, and to make them apply would be to suppose it was the intent of the Legislature to alter a fundamental rule of law applicable to corporations as to their powers, and that, too, in a law which, upon its face, covers only sales by a sheriff or constable. Previously to the Code, the tax collector might himself sell, but under the Code, the sale is to be by the sheriff—a regular bonded officer, whose bond may be sued for any failure in his duty by a private person. The tax collector's bond was not of that character, neither is the marshal's; at least, there is no law to authorize it in terms, and we doubt if a citizen could sue on it. But, however this may be, the rule is, so far as we know, universal that a corporation has only such rights as the law gives it, and its charter must be followed to justify any acts done by its officers. Under this levy, even if the levy be good—sufficiently certain—the failure to advertise the thirty days required by the charter would be fatal. It is plain from the statements in the bill, which are not denied in the answers, that the failure to advertise the full thirty days is the cause of the whole trouble. The complainant had a right to look no further when he found that the paper where the advertisement must be published did not contain it at all, until there was less than thirty days till the first Tuesday of the next month. If sold at all, it *must* be then or later. And when he found it was not in the paper of the day, thirty days before the sale, he had a right to suppose it would not be sold. The charter must be pursued. The city and its officers have not the legal right to divest a citizen of his property by seizure and sale, unless they conform to the law, and a purchaser buys with the burden on him to show that this was done. The title does not pass until the law has been complied with. The authority to the marshal to make the deed does not exist, except on the terms prescribed. Even if it be admitted that, under our Code, a sale for taxes, under State process, and when the sale is by the sheriff, stands upon the same footing

in all respects as a judicial sale, and that a failure of the officer to comply with the prescribed forms will not vitiate the sale in the hands of an innocent purchaser, we do not agree that this change which the Code makes (if it does make it) applies to sales by the marshal of a corporation for taxes due. Such sales stand on their old footing. They must conform to the charter, and no title passes, if there be a failure to comply, even as to the mode of sale; and purchasers *must take notice*. It is a question of validity and not of irregularity. It is not necessary to decide whether in the case of a good sale under the charter, the original owner has, or has not, the power to redeem in one year. Were it necessary, we are strongly inclined to hold that the right to redeem would exist. There is a wide difference between the question whether those portions of the Code relating to tax sales, sections 890 to 903, which *enlarge* and give additional effect to such sales, apply to sales under a corporation charter, and whether the provisions of sections 898, (Code of 1873,) which *restrains* and limits the effect of such sales, applies also to corporation sales. What the State grants to its own process, it may well not intend to grant, also, to a corporation process; but what it *denies* to its own process, it would seem would be also denied to corporation process. Such, at least, would be the presumption unless the charter was very distinct to the contrary. We do not, however, decide this question positively, as it seems to be unnecessary to the question before us, to-wit: whether the injunction should or not be sustained.

Judgment affirmed.

WILLIAM H. GOODRICH *et al.*, plaintiffs in error, vs. GEORGE W. WILLIAMS, defendant in error.

1. When a promissory note is made in South Carolina, payable on its face at Charleston, to a citizen of South Carolina, it is a South Carolina contract, notwithstanding the maker lives in Georgia, and notwithstanding, at the time of the making of the note, the maker also

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executes a mortgage to secure it on goods situated in Georgia, the residence of the mortgagor.

2. A mortgage is not illegally foreclosed because the affidavit of the mortgagee for foreclosure is made before a Notary Public who is also an employee in the office of the attorney at law, employed by the mortgagee to foreclose the same.
3. A mortgage upon a stock of goods then on hand, and upon the additional purchases as they should be made, is a good lien under our law to the amount of the goods on hand at the time, and is good upon future purchases, to that extent, even if those purchases be unpaid for, except as against any legal liens or title that may be against the goods in the hands of a third person.
4. There is no error in the judgment in its finding upon the facts.

Mortgage. Contracts. New trial. Before WILLIAM H. HULL, Esq., Judge *pro hac vice*. Richmond Superior Court. October Term, 1872.

The issues involved in this litigation arose upon a rule against the sheriff of Richmond county, at the instance of Williams, requiring him to show cause why he should not pay over the moneys in his hands arising from the sale of the property of Charles B. Day, to a mortgage execution in favor of said Williams. The answer of the sheriff showed in his hands the net amount of \$7,537 42, which was claimed by Goodrich and other creditors. They attacked the mortgage of Williams and the proceedings to foreclose the same, upon the following grounds :

1st. That the note and the mortgage given as security therefor constituted a Georgia contract, and having been foreclosed for the principal and interest, at fifteen per cent., a part of the amount claimed in the execution was not due.

2d. That the affidavit upon which the foreclosure was based, was taken before a clerk or student at law, in the office of the attorney employed to foreclose the mortgage.

3d. That the stock covered by the mortgage had been sold prior to the foreclosure.

4th. That there was not a sufficient stock in the store at the date of the mortgage to cover the indebtedness.

Goodrich being related to Judge Gibson, of the Augusta

Circuit, William H. Hull, Esq., was selected by the parties interested as Judge *pro hac vice*, and to him were submitted all the issues of law and fact.

The evidence made the following case: On May 28th, 1870, at the city of Charleston, in the State of South Carolina, Day made and delivered his note, payable "to the order of George W. Williams, at the office of George W. Williams & Company, Number one, Hayne street, Charleston, South Carolina," one day after the date thereof, for \$4,000 00, with interest from date, at the rate of fifteen per cent. per annum, payable monthly. On the same day and at the same place, as security for the payment of said note, he executed the following mortgage:

"STATE OF SOUTH CAROLINA—

"COUNTY OF CHARLESTON:

Know all men by these presents, That I, Charles B. Day, of Augusta, in the county of Richmond, and State of Georgia, for and in consideration of the sum of \$4,000 00, to me paid by George W. Williams, of the city of Charleston, in the State and county first aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and deliver, unto the said George W. Williams, all and singular, the goods, wares and merchandise, now in the store in the said city of Augusta, known as number two hundred and sixty-one, Broad street, consisting of a general stock of dry goods, groceries, hardware, cutlery, hats, caps, boots, shoes and divers other articles, too numerous to mention: To have and to hold, all and singular, the said goods, wares and merchandise, to him the said George W. Williams, his executors, administrators and assigns, to his and their sole use forever. And I, the said Charles B. Day, for myself, my executors, and administrators, do covenant to and with the said George W. Williams, his executors, administrators and assigns, that the said goods, wares, and merchandise are free from all encumbrances, and that I will, and my executors and administrators shall, war-

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rant and defend the same to the said George W. Williams, his executors, administfators and assigns, against the lawful claims and demands of all persons. Provided, always, nevertheless, that if the said Charles B. Day, his executors or administrators shall well and truly pay unto the said George W. Williams, his executors, administrators and assigns, a certain promissory note, bearing even date with these presents, for \$4,000 00, with interest from date, at the rate of fifteen per cent. per annum, payable to the order of the said George W. Williams, one day after date, then the conveyance shall be void, otherwise to remain in full force and effect. And provided, also, that until default by the said Charles B. Day, his executors or administrators, in the performance of the condition aforesaid, it shall and may be lawful for him or them, to keep possession of the said goods, wares and merchandise, using and making sales thereof, from time to time, in the usual course and manner of trade, and replenishing the stock thereof so as to keep it always of about its present value, and suffioient to form an ample security for the payment of the said promissory note. But if the said goods, wares and merchandise shall be taken, seized, levied on or attached, under any process, *mesne* or final, before the payment of the said promissory note, by any other creditor or creditors of the said Charles B. Day, or if the said Charles B. Day, his executors or administrators shall attempt to eloin or remove the said goods, wares and merchandise beyond the limits of said county of Richmond before the full payment of the said promissory note, then, and in either of the said events, it shall and may be lawful for the said George W. Williams, his executors or administrators, or assigns, to take immediate possession of the whole of the said granted property, to his and their own use. And it is also expressly agreed between the said parties to these presents, that the said goods, wares and merchandise, shall be kept insured in solvent and responsible companies for the amount of the said note, at least; and that upon any default herein by the said Charles B. Day, his executors or administrators, the said George W. Williams, his

executors, administrators, or assigns, shall be fully authorized and empowered to take immediate possession of the said goods, wares and merchandise, and the said promissory note shall at once become due and payable.

"In testimony whereof, I have hereunto set my hand, and affixed my seal, at the city of Charleston aforesaid, this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and seventy.

"CHARLIE B. DAY, [SEAL.]"

"Signed, sealed, and delivered,
in the presence of

"EDWIN PLATT,

"V. J. TOBIAS, a Commissioner for Georgia."

"STATE OF SOUTH CAROLINA—

"CHARLESTON COUNTY :

"Before me, V. J. Tobias, a commissioner for the State of Georgia, residing in Charleston, South Carolina, personally came the within named Charlie B. Day, to me known to be the individual described in the within deed, and acknowledged to me that he executed and delivered the same for the uses and purposes therein expressed.

"In witness whereof, I have hereunto set my hand and official seal, at Charleston, aforesaid, this twenty-eighth day of May, in the year 1870.

[SEAL.]

"V. J. TOBIAS,

"A Commissioner for Georgia."

"Recorded in Richmond Superior Court, June 1st, 1870, book xx., folios 651, 652 and 653."

The interest was paid on the above described note monthly at fifteen per cent., until April 4th, 1872.

On May 8th, 1872, an affidavit to foreclose the mortgage was made before Henry W. Carr, a Notary Public, and based upon this affidavit, a foreclosure was had, which resulted in the execution now claiming the fund. The judgment of foreclosure and the execution thereon embraced interest at fifteen

per cent. Henry W. Carr, at the time of the foreclosure, was an employee in the office of Joseph P. Carr, the attorney for the mortgagee. His testimony as to his *status* in the office was as follows: First came to J. P. Carr's office to have a place in town where I could come and get my correspondence with Mr. J. W. Spratley, about State agency of a Mobile Life Insurance Company. No stipulation as to compensation. Offered to copy papers gratuitously. Never got any compensation, only in bankruptcy cases, and except in cases of cotton tax, in which J. P. Carr had no interest. In 1872, J. P. Carr proposed to witness to read law, qualify himself for office practice, and go into partnership, which proposition was never accepted. Copied papers and performed clerical duties only when J. P. Carr was pressed. Did not feel bound to stay in the office, but went out whenever had any business. After correspondence with Spratley ceased, made effort to get into other business. Accepted position of local agent of Phoenix Life Insurance Company; resigned it after about a week. Afterwards applied to Major Jackson for position on Port Royal Railroad. Afterwards discussed various schemes for other business, among others, with Mr. Hope for a position on canal. In August, 1872, left the office of J. P. Carr. Copied papers, prepared bankruptcy papers, went to clerk's office, sometimes made deposits.

Attended at office every day in his absence; told clients he was absent or sick as the case might be. Did not attend at levy of execution. Carried papers sometimes to Judge. Carried this foreclosure to clerk, and perhaps gave instructions to sheriff, at request of J. P. Carr. Took mail out in his absence; had no authority to open letters. Never received pay as Notary Public; did not in this instance. Brother of J. P. Carr. Had a key to his office.

At the date of the mortgage, the stock was of the value of \$7,019 00; at the date of the levy of the mortgage *fi. fa.*, of the value of \$14,621 83, of which, goods to the amount of \$7,500 00 were unpaid for. Very few of the goods on hand at the date of the mortgage were in the store at the time of

the levy. The stock was continually being changed by sales and purchases. The fund in Court arose from the sale of this stock.

The Court held as follows: "I hold the mortgage of Williams to be a good lien under the laws of Georgia.

"The goods were here, and this was the domicile of the owner. It is, therefore, to be governed by the law of this State: See *Fishburn vs. Kunhardt*, 2 Spears, 556. Same doctrine recognized *obiter* in *Oakes vs. Bennett*, 11 Howard, 45.

"But the note was a South Carolina contract, and bears interest by the law of that State, notwithstanding it was secured by a Georgia lien: See *Wolf vs. Johnson*, 10 Wheaton, 367.

"The foreclosure I hold good. The taking an affidavit to foreclose is a purely ministerial act. I see no element of the judicial function in it. And although our Code forbids the attorney to take the affidavit himself, it does not extend to one employed in the attorney's office. If, indeed, a case of an affidavit taken by a mere servant and agent of the attorney were shown, it might be considered as taken by himself; but the evidence in this case does not, in my opinion, show such a state of facts. Moreover, the lien of a mortgage does not depend on its foreclosure, and if this foreclosure were held bad, equity would hold up the fund until a proper foreclosure could be had. And in rules to distribute money, the Court administers on equitable principles. But the lien of the mortgage only extends to the amount or value of the stock at the time it was given. So our Supreme Court holds in the case of *Chisholm vs. Muse*.

"I find from the evidence that the stock mortgaged

was worth\$ 7,019 00

"The stock levied on worth..... 14,622 00

"The amount in sheriff's hands, after paying expenses and paramount claims, is..... 7,537 42

"If I make any error in these figures, I reserve the power to correct them on being informed of it.

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"My judgment, therefore, is, that George W. Williams receive of the amount in the hands of the sheriff, the proportion which \$7,019 00 bears to \$14,622 00, which, if I calculate correctly, is \$3,664 57.

"The remainder will be paid to the other claims, according to priority."

To this judgment Goodrich and other creditors excepted.

FRANK H. MILLER ; BARNES & CUMMING, for plaintiffs in error.

1st. If an attorney at law of the party cannot issue an attachment as Notary, or take the probate of a mortgage, 37 Georgia, 681, Act March 8, 1869 ; Code 443, 193, 46 *Ibid.*, 253, his clerk cannot : Code, 3827, 5 *Ibid.*, 325, 424 ; especially where he is the attorney's brother : 46 *Ibid.*, 621.

2d. A money rule is an equitable proceeding : 24 Georgia, 150 ; 8 *Ibid.*, 196 ; 7 *Ibid.*, 52 ; 4 *Ibid.*, 170 ; and any person claiming an interest may tender an issue : 7 *Ibid.*, 52, 56 ; 17 *Ibid.*, 521 ; 24 *Ibid.*, 146 ; 20 *Ibid.*, 668.

The Court cannot compel all creditors to unite, but if any creditor moves the rule, and the others are notified, the same is sufficient, and the judgment will bind all : 20 Georgia, 668 ; or all may unite in the same rule : 17 *Ibid.*, 522.

3d. In enforcing the payment of a debt in Georgia, the laws of this State govern as to the remedy and effect : 37 Georgia, 428 ; 35 *Ibid.*, 176 ; 6 Am. Rep., 268.

A mortgage made to avoid the Georgia law as to usury, is void : Code, 2025. If not void, the mortgage is a Georgia contract, certainly void as to the usurious interest : 4 Kelly, 1 ; 2 Speers, 556.

4th. Personal property is presumed to follow the person ; this mortgage then, if not void under the law of Georgia, was not such a contract as the law of the place where made would govern : 30 Georgia, 440.

5th. It appears that of the stock levied on, \$7,500 00 was unpaid for ; therefore, this amount of stock was neither on hand at the date of Williams' mortgage, nor paid for with the

proceeds arising from the sale of goods then on hand. Williams therefore cannot, certainly as against Day, recover more than what \$7,122 00 worth of goods brought—but there are other creditors who, in the *interim*, have acquired liens, which attach to the goods on hand at the dates thereof. It must, therefore, appear that the goods then on hand were the same mortgaged to Williams, or they take precedence: *Anderson vs. Howard & Sons*, decided August 12, 1873.

6th. The usury laws of Georgia apply to the contract, unless proof is made that there was no usury in South Carolina, which was not done: 6 Am. Rep., 268. The Court may proceed on its knowledge of the laws of South Carolina, but if it appears that the parties had in view another place, the laws of that place will be preferred: 12 Georgia, 582.

JOSEPH P. CARR, by RICHARD H. CLARK, for defendant.

1st. Loans at a place bear interest of that place unless payable elsewhere: *Story's Conflict of Laws*, section 291; cites *Wolf vs. Johnson*, 10 Wheaton, 367, 383.

2d. No difference if secured by mortgage on goods in a place where interest is lower: *Story's Conflict of Laws*, section 293, cites 2d Atkins, 382; 3 *Ibid.*, 727; 10 Wheaton, 367.

3d. If no place is named for payment, bound by domicile of creditor: *Story's Conflict of Laws*, 295.

4th. Remedy according to *lex fari*: *Story's Conflict of Laws*, 558; 2d Speers, 556; 11th Howard, 45.

5th. As to amount of goods mortgaged on a varying stock: *Chisolm vs. Chittenden & Company*, 45 Ga., 213.

6th. How mortgages on personalty are to be foreclosed: *Irwin's Code*, 3895.

7th. Attorneys cannot take affidavit, (Code, 443,) but the attorney here did not, neither is it proven that Notary was his clerk. If doubtful, judgment of presiding Judge conclusive, because it was a question of fact submitted to him and there is sufficient evidence to support judgment.

McCAY, Judge.

1. Whilst we think it not of much importance, (in view of the fact that even under our law the mortgage debt was good for more than the Judge gave it,) yet we are clear that this was a South Carolina contract—that is, the debt was. It was entered into in Carolina, it was by its terms made payable at Charleston, South Carolina. Nor does the fact that it was secured by a mortgage on goods in Georgia change the rule: Story on Con. Laws, 290, 293; 10th Wheaton, 367. It was said in argument that the going to Charleston and making the contract there, and specially providing in the note that it was to be paid in Charleston, was a fraud upon the laws of Georgia—a device to escape the effect of our law then in force against usury; but we see nothing in this. When Mr. Williams was applied to for the loan of money, he had a right to stipulate that the contract should be made according to the laws of South Carolina, the place of his residence, the place where he was doing business. He had a right to say the contract shall be made in South Carolina, and should be performed there. Had he, in reply to a letter of the borrower asking the loan, said, in terms, I live in South Carolina, I will lend you the money but you must come here for it, the note shall be made here and performed here, and its validity be determined by the laws of South Carolina, he would have only been doing what he had a right to do.

2. We will not extend the prohibition of section 408 of the Code of 1873, beyond its term, especially in reference to a mere ministerial act, such as an affidavit to foreclose. The Notary here does not appear to have been a clerk—a servant of the attorney. The relation which in fact existed between him and Mr. Carr does not bring him within the reason of the rule, even if it were to be extended to a servant. We agree also with the presiding Judge that as the mortgage was duly recorded, the question was not very material whether it was foreclosed or not. The money was in Court by consent, for distribution, and the mortgage was entitled to it by reason of

its date and record, and by reason of its being a lien on the goods.

3. We have decided in *Chisholm vs. Chittenden & Company*, 45 *Georgia*, 213, that a mortgage may, under our Code of 1873, section 1954, cover a stock of goods as it changes by purchases and sales, but that it can only cover an amount equal to what was on hand at the time. We adhere to that ruling. The permission to give such a mortgage, though a very convenient privilege, is one very easily used to commit fraud, and we think the spirit of the Code as well as public policy requires it to be limited as we have limited it. We have know of several cases where mortgages of this character have been given, with a small stock at the time, and large purchases made on credit soon afterwards. The temptation to do this, if possible, would lead to fraud, and we think the object of the law is best attained by keeping the parties within the amount of stock on hand at the time. But the goods when purchased, if there be no fraud, and be delivered, belong to the purchaser and fall within the lien, though they be not paid for. The seller has no lien on them or title to them, and by the express words of the Code they fall into the lien of the mortgage. As a matter of course, if the goods brought into the stock were stolen goods, or goods with some other lien on them, or other good title in them of a third person, the mortgage could not cover them.

4. Altogether, we see no error in the judgment. The mortgage was entitled to be paid in proportion to the amount of goods it was a lien upon. It furnished that much to make the fund, and we think the division made was right. The goods sold were of the value of \$14,622 00. The mortgage was a lien upon \$7,019 00, of that stock, and it was entitled to such a proportion of the fund in hand as \$7,019 00 bears to the stock seized and sold, to-wit: \$3,664 00, or about that sum.

Judgment affirmed.

The Augusta, etc., Club *vs.* The Cotton States, etc., Association.

THE AUGUSTA AMATEUR MUSICAL CLUB, plaintiff in error,
vs. THE COTTON STATES' MECHANICS' AND AGRICUL-
TURAL FAIR ASSOCIATION, defendant in error.

Under the facts of this case, as they appear in the record, including the two rejected letters, which we think should have been admitted, we are of the opinion that the plaintiff was entitled to go to the jury on the proof, and that the non-suit was error.

Non-suit. Evidence. Before Judge GOULD. City Court of Augusta. February Term, 1873.

The Augusta Amateur Musical Club brought complaint against the Cotton States' Mechanics' and Agricultural Fair Association on an account for \$450 00, with a credit thereon of \$150 00, for services rendered in playing at the fair grounds, and at the tournament ball, during the fair week commencing October 25th, 1870, and ending October 29th, 1870. A *quantum meruit* count was subsequently added to the declaration by amendment. The record fails to disclose the plea of the defendant. The following evidence was introduced for the plaintiff:

CHARLES T. SMITH, sworn: I am a member of the Musical Club, and am secretary of the same; the names of the members composing the club are set out in the declaration; the club did furnish music to the defendant during the fair in October, 1870. We played at the fair grounds of defendant, and occupied the grand stand; we played on October 25th, 26th, 27th, 28th and 29th; we also played at the tournament ball, given on Thursday night, October 27th, 1870. (The account was here shown witness, and he said, "the account is just and correct, and the charges are reasonable and proper.") The services were performed, and there is still due us a balance of \$300 00; the account was for \$450 00 originally, but we received from the treasurer of the Fair Association, November 7th, 1870, \$150 00 on account.

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Cross-examined : We played for the Fair Association ; the tournament ball was given, as I believe, by the defendant ; Mr. Cohen engaged us to play ; he was present one night shortly before the fair at one of our practices, and seemed pleased with the music, and said he desired to engage us to play during fair week. He, as I understood it, acted as chairman of the musical committee of the Fair Association ; he showed no authority from the Fair Association ; I presumed he was chairman of the musical committee.

Re-direct : The charges are very reasonable ; the usual charge by musicians is from \$7 00 to \$10 00 per day, and from \$10 00 to \$15 00 per night ; we had over ten men with us all the time.

Re-cross : I testified in this case on the first trial at February Term, 1872 ; I am testifying as I did then, as near as I can recollect. I cannot mention any special case or time when I got from \$10 00 to \$15 00 per night ; I do not recollect any special time when the club—each man—got \$10 00 or \$15 00 per night ; I understood the ball was given by the Fair Association ; I considered we were employed by the Fair Association from Mr. John J. Cohen's letter and from his actions ; we had some assistance from Savannah ; while playing, we were under the charge of the officers of the Fair Association ; I don't know that I can give all of their names ; Mr. E. H. Gray, the Secretary, gave us directions once or twice ; Mr. Thomas P. Stovall (who, I believe, is one of the directors) from the Judge's stand, just opposite the grand stand, frequently during the races, etc., gave us notice when to start and to stop playing ; the management was about the same at the ball ; we were not under the management of any particular officer ; the floor managers gave us directions about the dances.

Second re-direct : We were passed at the gates and into the grand stand free of charge, and also at the ball ; the services for five days and the night were worth \$450 00 ; the Fair Association agreed to pay us \$450 00 ; Mr. J. J. Cohen paid us \$150 00 on account, for which I gave him a receipt. (Here defendant being unable to produce the original receipt

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under the notice duly served, witness was allowed to give its contents, as follows:) When I received the money from Mr. Cohen, I wrote on the back of the original account, "Received from John J. Cohen & Sons, Treasurers of the Cotton States' Mechanics' and Agricultural Fair Association, \$150 00 on account of the within bill." I signed it, "Charles T. Smith, Secretary." The bill was also marked, "Approved, John J. Cohen, Chairman." The bill was made out about like the one attached to the declaration. The letter of Mr. Cohen was here shown witness, and he identified it as the one Mr. Cohen brought to the club, and under which the club entered into negotiations with him about playing. A copy of said letter is hereto annexed, marked "Exhibit A." A copy of the reply to the same (defendant having failed to produce the original) was also shown witness and identified as correct. A copy thereof is hereto annexed, marked "Exhibit B."

Second re-cross: I never went to Mr. Branch myself; I believe some of the club went to him; they were told to go to him and he would pay them; we wanted the money and went most anywhere we were told we could get it; I can't say Mr. T. P. Branch was chairman of a committee of citizens; I knew nothing about any such committee; we looked to the Fair Association for our money.

FREDERICK L. COOPER, sworn: I am a member of the band; we played for defendant, as stated by Mr. Smith, at the fair grounds and at the ball; the account is correct, and the charges are reasonable; we played five days and one night; amateurs usually get from \$7 00 to \$10 00, and professors from \$10 00 to \$15 00 per day for playing; we were employed by Mr. John J. Cohen (as we understood) who acted as chairman of the musical committee of the Fair Association. We never knew any one else in the transaction but defendant; Mr. Cohen said he desired the band to look well, and we went to the expense of getting a new uniform which is still unpaid for, because we failed to get our money. We had about thirteen men with us during the week.

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ADOLPH BRANDT, sworn: I am a member of the club; we played for the defendant, as stated by the other witnesses; we were employed by the Fair Association, through Mr. John J. Cohen, as stated by Mr. Smith; when we were first spoken to by Mr. Cohen, the club held a meeting, and after debating, it was decided to play for defendant for \$500 00; Mr. Cohen appealed to our generosity, and we decided if the Fair Association would furnish its own bugler, we would play for \$450 00; Mr. Cohen closed with us on these terms; the Fair Association did furnish its own bugler and we played according to agreement.

ANDREW HETT, sworn: I am a professional musician and the leader of the club; we played for five days and one night for the Fair Association; the charge is reasonable; I can't say exactly how many played.

Cross-examined: I think thirteen musicians for five days and a night were worth \$450 00; there was a negro band playing on the Fair Grounds during the week; they did not play during the time we played; we had nothing to do with them; a professional musician is worth \$10 00 a day.

Plaintiff here offered the letters, (John J. Cohen's and the reply to it) which were objected to by defendant, on the grounds that no authority had been shown in Mr. Cohen to make the contract for the Fair Association, which objection was sustained by the Court and plaintiffs excepted.

Plaintiffs closed; whereupon the defendant moved for a non-suit.

After some argument had, plaintiffs introduced John J. Cohen, who testified as follows: I am the senior member of the firm of John J. Cohen & Sons, who are the treasurers of the Fair Association. The club played at the fair grounds in the grand stand. I can't say they played for, or that the Association got the benefit of their services. The letter referred to above was here shown witness, who identified it as the one written by him; I had no authority to make any contract for the Fair Association; I was chairman of the citi-

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zens' committee, and in that capacity made the contract; I don't know that I disclosed to the members of the club for whom I was acting. The firm of John J. Cohen & Sons, as treasurers, did pay the club \$150 00 on account; the money was paid under instructions from E. H. Gray, the secretary, who thought that about the amount the Fair Association ought to pay as their proportion; the Fair Association has never repudiated this payment.

Cross-examined: During fair week, the Agricultural Congress and some other bodies were in session in the city, and there were committees on the part of the City Council, Citizens, Board of Trade, Fair Association, and others, all acting in conjunction more or less to promote the interest of the congress, tournament party, Fair Association and other bodies; I was chairman of some of these committees, T. P. Branch of some, T. P. Stovall, John M. Clark, and various other citizens of others; some of these gentlemen are directors of the Fair Association; I made no contract as chairman of the musical committee of the Fair Association; I don't know that there was any such committee; I had no authority to make a contract for music for the Fair Association. The tournament ball was not given by the Fair Association; it was given by the various committees before mentioned.

Plaintiffs again offered said letters, which were objected to as before, and the objection sustained. Plaintiffs then announced closed. Defendant renewed its motion for a non-suit, and after argument had the same was sustained by the Court.

"EXHIBIT A."

"AUGUSTA, GEORGIA, October 13th, 1870.

"The undersigned, committee of the Cotton States Mechanical and Agricultural Association desire to ascertain from the gentlemen of the Amateur Musical Association what time during the fair week they can appropriate to their services, and if they can furnish a bugler to be at the call all the time, and a full string and wind band for the grand reception and ball of the tournament party, and for the entire time of the

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tournament as below: On Tuesday, first day, between eleven and two o'clock; on Wednesday and other days, between two and five; on tournament day as within; on ball night under order of committee. The gentlemen of the Musical Association will please consider the above requests and confer with the committee about the amount of compensation. The Fair Association being a volunteer affair on their part deem that the musical gentlemen will be moderate in their demands.

(Signed) "JOHN J. COHEN, Chairman."

"EXHIBIT B."

"AUGUSTA, GEORGIA, October 14, 1870.

"MR. JOHN J. COHEN, Chairman :

"*Dear Sir*—We, the undersigned, the committee appointed by the Augusta Amateur Club, to report to you the result of the action taken by the club upon your letter of the 13th instant, in relation to the engagement of the club to furnish music at the fair grounds during the approaching fair, beg to say that the club will give their services to the Fair Association, during the fair week, for the sum of five hundred dollars, (\$500 00,) and will comply with the following order of duties as contained in your letter, to-wit: On Tuesday they will furnish music from eleven o'clock until two; on Wednesday and other days of the fair, except the tournament day, from two o'clock until five; on the tournament day they will furnish music during the entire tournament; on the night of the tournament ball they will furnish a full string and wind band, including the extra music which may be needed to complete the band. They will also furnish to the Fair Association a bugler, who will be subject to their orders during the entire week of the fair. In making this offer the club fully appreciate the assistance which has been rendered them in their organization, and have therefore made it at the smallest possible sum consistent with the duty which they owe to themselves. Out of the sum charged the club will be compelled to pay the number of musicians who may be called from another city to make the string band complete, provided the

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club find it necessary, and will have also to compensate the bugler for the extra services rendered by him, besides paying him his regular share of the proceeds. It being understood that the fair is not to continue more than five days.

(Signed)

“SCHRINER,

“SMITH,

“COOPER,

“Committee.”

Plaintiffs excepted and say, that the Court erred—

1st. In ruling out said letters, as said correspondence tended, if not to establish a contract, at least, under the circumstances of the case, to show defendant's connection therewith.

2d. In granting said non-suit, there being sufficient evidence before the Court to take said cause to the jury, leaving them to judge whether said defendant ever ratified said alleged contract, and if not, whether defendant got the benefit of the services of plaintiffs.

JOHN S. DAVIDSON, for plaintiffs in error.

BARNES & CUMMING; H. G. WRIGHT, for defendant.

McCAY, Judge.

Under the frequent rulings of the Court, a non-suit can only be granted when the plaintiff has furnished no evidence authorizing a verdict. We do not think this is the case. Two witnesses swear positively that the service was performed as claimed, and that it was worth the amount set forth in the bill of particulars. True, there is other evidence going to cast doubt and confusion over this evidence. It is, nevertheless, very clear that the plaintiffs did act as musicians for several days at the defendant's fair, and that they were recognized as musicians by the officers in authority at the fair. Whether they were mere volunteers, or went there in the employment of somebody else than the defendant or its agents, is in truth the principal question. Without doubt, they

thought they were playing for the defendant, and if they were not they were imposed upon by Mr. Cohen, who represented to them, in writing, that he was chairman of a committee appointed by the defendant. In our judgment, it was within the scope of the authority of such a committee to procure music, and to agree to pay for it. When Mr. Cohen says he had no such authority, we presume he means express authority, but if he was one of the appointees of the defendant to make preparations for the coming fair, the authority to employ musicians would be implied in the committee, and the act of their chairman might fairly be taken as the act of the committee itself. Mr. Cohen says he did not contract with them as chairman of the defendant's committee; but the fact is he did so contract, for the letter which he admits was written by him, not only styled him the chairman of defendant's committee but appeals to them for a low charge, in consideration that the Fair Association is itself acting liberally in giving the entertainment. Were this any other corporation or individual, the fact that the plaintiffs played at the fair, occupied seats on the music stand, and were under the orders of the officers, would itself be sufficient to charge them. And *prima facie*, we think it does charge them. Nor does the statement of Mr. Cohen, that he acted as chairman of some other committee in employing them, conclusively rebut that presumption. By his letter, written at the time, and as part of the transaction, it is apparent that this was a mistake. Mr. Cohen has evidently forgotten what he did do and how he acted. That he was the plaintiffs' witness does not make what he now says conclusive. Is a man bound—concluded—by the *mistake* of his witness, if he has other proof showing the mistake? This is not discrediting his witness. We think the letters ought to have been admitted and the case submitted to the jury for their finding. Altogether the evidence made a sufficiently *prima facie* case to put the defendant on his defense.

Judgment reversed.

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THE CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* THE ATLANTIC AND GULF RAILROAD COMPANY, defendant in error.

1. Assuming that the Confederate government could, for the purpose of carrying on war against the United States, divest the plaintiff of his property by seizure—which is not made a question here—and assuming that the Court was in error as to the necessity of an Act of Congress to authorize an impressment, and that it was absolutely necessary that full compensation should be made, so as to protect the title in an innocent holder, yet, under the facts of this case, as they stand without question on the record, the plaintiff was entitled to a verdict. The defendant was fully informed of the instructions of the agent, that the iron was to be shipped to Atlanta to be rolled into plating for ships, and before the iron was in fact taken out of the possession of the plaintiff, contracted with the agent that when taken, the iron, instead of going forward to Atlanta, should be turned over to it. This contract was illegal outside of the instructions of the agent, and this was in the knowledge of the defendant, so that the actual seizure was in fact for the use of the defendant, and not for the Confederate States. The defendant is not an innocent holder, but is in complicity with the agent in his possession of the iron, and that under a contract entered into before the iron left the possession and custody of the plaintiff. In this view of the case the errors of the Judge, if they were errors, are immaterial, as the verdict must have been for the plaintiff.
2. It was not error in the Court to refuse to charge the jury that they might take into account the injury to the defendant's iron by General Sherman, and to charge that if they found for the plaintiff they might find the highest proven value of the iron up to the time of the trial.
8. The verdict of the jury was illegal in finding the highest proven value and any interest for the plaintiff. The measure of damages under our law is, as was charged by the Court, and it is not in the power of the jury to find a verdict for such damages, with interest from any date. Unless the plaintiff will remit this verdict for interest, there must be a new trial.

Confederate States. Impressment. Constitutional law. Trover. Damages. Interest. Verdict. Before Judge SCHLEY. Chatham Superior Court. May Term, 1872.

For the facts of this case, see the opinion.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

LAW, LOVELL & FALLIGANT, for defendant.

McCAY, Judge.

A brief statement of the facts of this case is as follows: In March, 1862, Mr. James G. Miner was ordered by Mr. Mallary, the Confederate Secretary of War, to proceed to Atlanta, Georgia, and make arrangements with a rolling mill there to roll, pierce, etc., iron plates for plating vessels of war. He was also ordered to secure all the old rail or other iron *in the market*, at the lowest price, and send it to Atlanta to be rolled. In April, 1862, he was further instructed by Mr. Mallary, that if he found either old or new iron in private hands, suitable for rolling into sheathing, etc., to purchase it if possible at a fair price, paying for it one-half in Confederate notes and one-half in Confederate bonds. If the offer was declined, he was to notify the parties that the iron was wanted for the naval service, and that he *would be compelled* to take it and pay for it its appraised value. He was to call upon the owner to appoint an appraiser, and he was himself to appoint one, and the two were to fix the price. He was, when this was done, to pay for the iron and seize it. Mr. Miner, finding certain iron in possession of the Atlantic and Gulf Railroad, at various points along its line, offered to buy it; the road declined to sell, and in June, 1862, Miner notified the company, in writing, that he had that day seized and taken possession of the iron for the Confederate States, for the public defense, and that the Government would pay for the same when the weights were ascertained, one-half in bonds, and one-half in Treasury notes. He did not, however, in fact, take possession of the iron, but left it as he found it, in piles along the road. The road refused to transport the iron, protested against the seizure, and applied to the authorities at Richmond to stop it. After the written notice was given, and while the iron was yet unmoved, Miner proposed to the officers of the Central road that if it would furnish him old railroad iron *then* he would give ton for ton of new iron for it when he could get the transportation over the Gulf road. The Central officers refused, unless he should

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have the new iron in possession and deliver it. Subsequently, and still before the iron was actually taken away from the Gulf road, it was agreed between Adams, the superintendent of the Central, and Isaac Scott, who, it seems, was entrusted by Miner "with the disposition of the iron," that as the Gulf road iron came on to Savannah, it should be delivered to the Central, and the Central should send on to Macon old iron, ton for ton, paying to Scott \$32 00 per ton *bonus*, Mr. Cuyler remarking that it was a pretty sharp thing in Scott, but directing Adams to make the arrangement. In September the Gulf iron was actually taken away from the road, under the direction of the Confederate Quartermaster's Department. Five hundred tons of it were delivered to the Central, the latter furnishing that quantity of old iron, and paying to Scott the \$32 00 per ton *bonus*. Miner showed to Adams, at the time he made the proposition for exchange, his instructions. No appraisement was made, and no payment, though the evidence does not show that the officers of the Central knew this. The evidence is clear, however, that they did know that the iron they got was Gulf railroad iron, and that they had made arrangements with Scott to make the exchange and pay the *bonus* before the Gulf iron was *actually taken out of the possession of the Gulf road*, and that they also knew that Miner's instructions did not authorize him to make any such bargain. The iron, thus obtained by the Central road, was soon after laid on its track. In November, 1864, General Sherman tore up much of the track of the Central road, and bent a good deal of its iron, so that it had to be sold as old iron. This action was brought in 1866, by the Gulf road against the Central, in trover, for the iron which went into its possession. Iron was proven to have cost the Gulf road, laid down at the point where this was taken, \$98 11 per ton, in 1867. The jury found for the plaintiff for the highest price proven of iron, to-wit: the price paid by the Gulf road in 1867, with interest from the 23d September, 1865.

We do not feel called on to discuss or decide several of the

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questions made at the trial, and very ably and elaborately argued by counsel at the hearing before this Court.

1. In the view we take of the issue between the parties, as established by the proof, we are of the opinion that the verdict, except for the interest, is right, whether his Honor Judge Schley ruled correctly as to the powers of the Confederate States officers under its Constitution and laws, to seize property under the circumstances, or not. Assuming that the Confederate 'States' Secretary of War might lawfully divest a title by seizure, that no Act of Congress was necessary, that a great exigency existed, and that under the circumstances even payment was excused, or that an innocent third person, setting up title through the Confederate States, was protected unless actual notice of non-payment was shown. Assuming all this—which we do not decide—we are of the opinion that, under the facts proven, the Central road is liable to the Gulf road for this iron. Mr. Adams knew Miner's instructions to seize and forward the iron to Atlanta. Before the iron was actually seized, indeed whilst it was an open question and under discussion between the Gulf road and the authorities at Richmond, whether it should be taken away at all, the contract was made with Scott that when the iron was taken it should go forthwith into the possession of the Central road.

In the very nature of things, an impressment can only be by *taking possession*. We will not say that if an officer be about to take possession, and have the present capacity to do so, and the owner acquiesces, he may not afterwards be treated as the bailee of the public. But surely a mere notice of seizure, with a protest and objection by the owner, as was the case here, is no seizure. The evidence is clear that nothing was done by Miner, but to give the written notice, and even this stated that payment would be made after the weight was ascertained. The iron remained as it was, along the line of the road, in possession of the owner, not even under guard, the company refusing transportation for it and objecting to the impressment. As we have said, the very essence of an impressment of personal property is taking possession. It is

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thus goods are seized under the revenue laws ; it is thus a sheriff seizes ; it is thus a landlord distrains. It would be monstrous to say that a citizen could be divested of *his title* in personal property under any form of government by notice that the public had seized it. Doubtless, Mr. Miner had some enlarged idea of his powers, and supposed that it was competent for him to set down in his office in Savannah and by the magic of his pen seize the one thousand tons of iron scattered along the line of the Atlantic and Gulf road. But if he could do this (by the practice of *any* government) his five thousand tons of iron could easily have been got ; at least, he could easily get *title* to it, for by this simple process the iron of everybody in the State was as easily taken as the iron of the Gulf road. But both Mr. Adams and Mr. Cuyler knew this would not do, and they refused to give even old iron for new until the new was in Miner's possession. But they *made the bargain* with Scott, and when this Gulf iron was, in fact, taken—impressed, seized—from the Gulf road, it was taken, not to be sent to Atlanta to be rolled, not to be used for the plating of war vessels for the Confederacy, but to be turned over to the Central Railroad, in pursuance of a contract made by Scott with Adams. And this the Central officers knew ; indeed, by the bargain, as stated by Adams, the Gulf iron was to be delivered at Savannah, as it came forward, and the Central to send on the old iron and pay the money. There is nothing in Miner's instructions to justify this bargain, and these instructions were shown to Mr. Adams. The true state of the matter, therefore, is, that this iron was *taken to be turned over to the Central road*, and this with the full knowledge of Mr. Cuyler and Mr. Adams, they to pay to Scott \$32 00 per ton for the benefit their road got in the transaction. The right of eminent domain has never been held to go this far.

To justify taking private property for public use, the taking must be at least with intent to so apply it. To take it for the purpose of exchanging it with another citizen for his property, is a perversion of the right. Such an act does not come within the scope of the right of eminent domain. The Central iron

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was as subject to seizure as the Gulf iron, and to take the Gulf iron and exchange it for the Central iron was an act of favoritism and not at all a seizure for public uses. And this was by agreement with the Central before the taking was completed. The perversion of the iron from its true use was part of the purpose of the taking; it was a vice that entered into the impressment itself, and would have vitiated it had every form prescribed by law in times of peace been complied with. And of this purpose the Central road was fully aware. It contracted with Scott with the full knowledge that the iron was to be traded to it instead of going forward to Atlanta to be used by the Confederate States for plating ships.

The right to take private property for public use is not thus to be perverted for private purposes. Such a taking is utterly void, though every form be complied with, and the full value paid to the owner: See Cooley's Constitutional Limitations, 540, and other cases there cited.

It was contended in the argument that this exchange to the Central road of new iron for old, was itself for public use; that the Central road was part of the great line from the west to the seaboard and to Richmond, and that it was the public policy of the Confederate States to keep this important line in good condition, even if in doing so other roads of less importance were to be the sufferers. But this is an after-thought. Mr. Miner and Isaac Scott were charged with no such mission, even if such a purpose would justify impressing iron. The receipt of the \$32 00 per ton by Scott's "smart trick" as it was, gives, we fear, the true character to the transaction. We fear the true purpose was to get the money; and that not even an intent to benefit the public was indulged in. At any rate the iron was taken from the Gulf road, to be hauled to the Central for old iron and money, and this the Central knew and participated in, and if this seizure was void the Central road got the iron with full notice of this illegal purpose, and can stand in no better situation than Miner or Scott. Under the authorities we have quoted, had every requisite of the law in time of peace been

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complied with; had there been an Act of Congress to authorize the taking; had appraisers been duly appointed, and gold paid to the full value of the property, the turning of the iron over to the Central road, would render the taking illegal and as the Central well knew that it was getting pressed iron of the Gulf road for its old iron \$32 00 per ton *bonus*, it stands charged with full knowledge of the illegality. It is in no better position than those who conceived the plan and carried it to completion, of seizing the Gulf iron for the Central road, sending forward the Central iron to Atlanta for the use of the Confederacy, and pocketing the \$32 00 per ton the Central paid for the advantage it got in the transaction.

For these reasons we think the jury was right in finding for the plaintiff, even admitting the Judge in error on the other points made. We do not discuss these points because we think it unnecessary, as the case will not, as we believe, be again tried. The view we have taken affirms the verdict of the jury and settles the liability of the Central road for the iron.

2. There was no error in the refusal of the Judge to charge that the jury might consider the injury to the defendant's iron by the Federal troops under General Sherman. The plaintiff had no part in that except as a common sufferer. The evidence fails to show that any of the iron now sued for was included in the bent and destroyed bars, and we do not know of any rule that would allow this to be considered if it did.

3. We are clear, however, that the verdict giving interest on the amount found from 23d of September, 1865, is illegal under our law. This is not an action for the price of the iron, waiving the *tort*. The measure of damages then would be the value of the iron at the time it was taken, with interest.

In this kind of action the verdict is for damages, a gross sum, and by our statute, Code of 1873, section 3077, the plaintiff may recover the highest proven value of the thing up to the time of the trial. This Court, in 37 *Georgia*, 335, decided that this is now the only rule. Perhaps this is too broad a statement, as cases may occur, as, for instance, where

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the property has merely passed through the defendant's hands, where the sounder rule would, as I think, be to give the value at the conversion, with interest since, not as interest but as the measure of damages.

Judgment reversed, conditionally.

THE COAST LINE RAILROAD COMPANY, plaintiff in error,
vs. OCTAVUS COHEN *et al.*, defendants in error.

1. A Court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance being purely a public one, can only be restrained by the public, on information filed by a public officer, to-wit: by the Solicitor General for the Circuit.
2. Nor is it sufficient that one of the parties is a lot owner on the street, no specific injury to said property being alleged, but only a general allegation that damage will result to said lot.
3. A railroad company was chartered, with the privilege of running its road from such point within the limits of the city of Savannah as the Mayor and Council of the city should designate, and from thence to the sea coast, by certain cemeteries outside of the city, but used by the citizens for the burial of their dead. The Mayor and Council fixed the initial point considerably within the city, and passed an ordinance permitting the company to lay down its track from such initial point through certain streets and squares on the route from such point by said cemeteries in the direction prescribed by the charter, and to run horse cars thereupon:

Held, That such permission was within the authority of the Mayor and Council over the streets and squares of the city, and under its charter the company might, with such authority, so use the streets, not obstructing them permanently by excavations or embankments, and leaving them conveniently passable, except by the passage of the cars. Under such limitations no public nuisance will be created, and no grounds for an injunction by the public exist.

Injunction. Nuisance. Municipal corporation. Before Judge HANSELL. Chatham county. At Chambers. November 5th, 1873.

Octavus Cohen, W. H. Tison, Henry Brigham, Joseph S. Claghorn, William Remshart, James W. Lathrop, George W.

50	451
105	46
50	451
103	687
108	693
50	451
123	489
50	451
124	291

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Wyly, John D. Hopkins and W. W. Remshart, filed their bill against the Coast Line Railroad Company, containing, substantially, the following allegations :

That they are citizens and residents of the city of Savannah, and owners of real estate and other property within the limits of said city, and that, as citizens of said city and State, they are entitled to the free and unobstructed use and enjoyment of the public streets and squares of said city, except where they had legally parted with, or been lawfully divested of said rights ; that the good health and sanitary condition of the city, and of themselves and families, depended on its thorough drainage and sewerage, and keeping the public drains in order ; that public sewers had been constructed along Broughton and Bolton streets, and the draining of said sewers is essential to the health of the citizens.

That the Legislature of the State of Georgia, by an Act approved October 10th, 1868, incorporated the Wilmington Railroad Company, with authority to construct a railroad from such point in the city as may be authorized by the Mayor and Aldermen, to any point or points on Wilmington Island, said Act giving no authority whatever to said company to pass through or over any street or square ; that the General Assembly, by an Act approved August 26th, 1872, changed the name of said Wilmington Railroad Company to the Coast Line Railroad Company. That the General Assembly, by an Act, approved December 21st, 1866, authorized the Mayor and Aldermen, in their corporate and public capacity, to construct and operate carriage railways in any of the streets of said city, upon certain conditions ; and among others, that they should not, in any manner, interfere with the free passage of vehicles, horsemen and footmen, and that no such railway should ever be built or laid on any street which runs through a square or a park, and that upon said conditions said city could let or farm said privilege ; that from time immemorial the public squares have been used by the citizens, their families and children, as places of recreation, and that the passage of horse-cars will not only injure their beauty, and

produce noise and dust, but injure them as places of safe and pleasant recreation, and will defeat the ends for which they were set apart; that the use of said squares by horse-cars is an invasion of their rights unauthorized by law.

That the present Mayor and Aldermen, by an ordinance passed September 29th, 1873, at the request of the said defendant, designated the intersection of West Broad and Broughton streets as an initial point, from which said defendant might commence a line of road, running thence east along Broughton street to Habersham, thence south through Habersham to Bolton street; that said ordinance does not give any express authority to said defendant to use said streets or squares, but it is a mere license, leaving the risk and responsibility upon it to rest upon such rights as it might have derived from the General Assembly.

That the defendant was proceeding, without authority of law, to lay a track to be used by horse-cars from West Broad street through Broughton street, east to Habersham street, thence through Habersham street, and through the public squares, intersecting said Habersham street, south to Bolton street, and thence east through Bolton street; that Wilmington Island is east of said city, and that an initial point could be designated in the extreme eastern portion of said city, whence said road could, by a more direct route, without passing through any of said streets or squares, reach its destination.

That Habersham street runs through several squares, and Bolton street through Forsyth Park; that large public sewers are laid in both Broughton and Bolton streets, and that the construction and use of a railway over them would interfere with access to and repair of the sewers. That Broughton street was one of the most important in the city; that the defendant had torn up and obstructed the same and was still engaged in tearing up and obstructing the same, for the purpose of laying said track, and that it seriously interfered with the free passage along and across said street.

That said City Council had not attempted to use said streets, or to lay tracks thereon in their public capacity, and had not,

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in said ordinance or any other, farmed or let said privilege to the defendant, but that the defendant was tearing up said street, on its own responsibility, without any legal authority whatever. That they had called upon the defendant to respect their rights as citizens, and to desist from tearing up the streets and squares, but it had refused to do so.

That complainants are the owners of property in said city, and as such owners and tax-payers, they contribute large sums to its support, and have a special interest in the amount of said taxes and the appropriation thereof.

That the sewers have been constructed at a large outlay, and that a large portion of the taxes paid by them have been applied to the thorough drainage of the city, and the improvement of the squares. That as tax-payers they had a right to insist that nothing should be done by the defendant to impair said system of drainage, or to prevent free access to said public drains, or to diminish the value of corporate property, or to endanger the lives of themselves or families, in the enjoyment of said public squares, or to divert said squares from their legitimate use. That the streets and squares are held by the Mayor and Aldermen in trust for the use of complainants and other citizens, and should be used for the benefit of the tax-payers.

That by the Act of 1866, the Mayor and Aldermen are allowed to let or farm the privileges therein mentioned, upon conditions advantageous to the tax-payers, and that the ordinance under which the defendant claims a right to traverse said streets, contains no condition in favor of said tax-payers.

That the Mayor and Aldermen have no right to give away the franchises, the property of the tax-payers, or to permit their use for any illegal purpose. That they have applied to the Mayor and Aldermen to prevent the unauthorized use of said streets and squares, and to use its power to abate public nuisances, to prevent the illegal obstruction of the streets and squares, but they refuse to interfere in their behalf and are guilty of a breach of trust in the premises.

That the injuries are immediate and irreparable in damages.

That one of the defendants, George W. Wyly, owns a lot on Broughton street, and that the special use of said street is an invasion of his rights, and that he is remediless at common law.

Upon these allegations complainants prayed for an injunction to be directed to the defendant restraining it from laying a horse railroad track, or any other track, upon Broughton street, or Habersham street, or Bolton street, or the squares on Habersham street, until their rights could be heard and determined.

To this bill was attached, as an exhibit, an ordinance of the City Council of Savannah, passed September 29th, 1873, giving the initial point to the Coast Line Railroad Company.

The defendant filed a general demurrer to the bill for want of equity, and moved that the issue as made by the demurrer should first be considered and disposed of before it should be called on to answer, claiming the right to open and conclude the argument on bill and demurrer. The motion was overruled and counsel for defendant excepted.

The defendant then filed its answer to the bill, admitting that it was proceeding to construct a railway from the intersection of Broughton street and West Broad street, through Broughton, Habersham and Bolton streets, in the city of Savannah. That the Wilmington Railroad Company was incorporated by Act of the Legislature, October 10, 1868, attaching a copy of the Act as an exhibit, and that the said Act was amended August 26, 1872, and the style of the company changed to the Coast Line Railroad Company, attaching a copy of this Act also as an exhibit.

That by said Act the defendant was authorized to construct a railroad from such point in the city of Savannah as may be authorized by the Mayor and Aldermen, to any point or points on Wilmington Island, with leave to pass conveniently near to the Cathedral and Bonaventure Cemeteries, which lie in the direction of Wilmington Island. That in pursuance of the authority and requirements of the said Acts, the Mayor and Aldermen, by ordinance, authorized the de-

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fendant to build its track from the point of intersection of Broughton and West Broad streets, and that it was proceeding to construct its road from the point so authorized to Wilmington Island by the said cemeteries, in the most direct and feasible route, through Broughton, Habersham and Bolton streets, until restrained by the order in this case.

That the construction of its railway along certain streets of Savannah did not, and would not, in any manner, obstruct or interfere with the free use of the streets, as they had been accustomed to be used, nor would it interfere with the use and enjoyment of the squares of the city, as they had been accustomed to be used and enjoyed. That the complainants to the bill, who largely own and control the Savannah, Skidaway and Seaboard Railroad, had constructed a railway in the city of Savannah through Abercorn street, a street intersected with squares just as Habersham street is, and that that railroad is not considered by them as interfering with the use and enjoyment of said squares. If so, the same is being continually run by said railroad company, with the full assent and permission of the complainants to the bill. That the said Savannah, Skidaway and Seaboard Railroad, owned and controlled as aforesaid, has been operating a railway on Whitaker street for several years, the track of which is upon and over a sewer, and that the same has not proved injurious to the sewer, nor does it interfere with the drainage or health of the city.

That the track of the defendant along the streets of the proposed route does not lie upon the sewer in said streets, but is being built under the direction of the municipal authorities of the city, who indicate the line upon which the track is to be laid. That the said track does not, and will not interfere with the drainage or health of the city.

That Bolton is not a public street, but is private property, and that neither the city nor the citizens have any right of easement over it.

That the complainants in the original bill knew of the intention of the defendant to construct a railway from the intersection of Broughton and West Broad streets, on the line

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since used, for several months past. That the work was commenced in the month of April of this year, and it was notorious that many thousand dollars had been expended on the same, and that the work of laying the track was in such a condition that the streets would be extremely inconvenient for the passage of vehicles, etc., having been upturned for the purpose of grading, etc. That no action had been taken to stop the progress of the work until this large expenditure had been made and the laying the track in the city nearly completed.

To the answer were appended copies of the Act incorporating the Wilmington Railroad Company, and the Act amendatory thereto.

Upon the hearing of the motion for injunction, voluminous affidavits were read, which are unnecessary to an understanding of the decision.

The Chancellor granted the injunction as prayed for, and defendant excepted.

The defendant assigns error upon each of the aforesaid grounds of exception.

RUFUS E. LESTER; JACKSON, LAWTON & BASINGER,
for plaintiff in error.

1. The Court should have disposed of the issue made by bill and demurrer, before proceeding further in the hearing. Although demurrer, plea and answer may be filed together, they must be disposed of in the order named: Code, 4191, [4132.] No injunction can issue pending a demurrer: 1 Daniell's Chan. Plea. and Practice, (Perkin's edition,) 666 Mar.; Cousons *vs.* Smith, 13 Ves., 164. The Court had power to hear and determine the demurrer: Acts of 1869, p. 136. And, by sustaining the demurrer, to refuse the injunction: Powell *vs.* Parker *et al.*, 38 Ga., 645. In giving notice of application for an injunction on bill just filed, the complainants below put the defendant on its defense at that time, whether by demurrer, by plea or by answer, and consequently waived the notice required by the Act of 1869.

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2. The Court had no jurisdiction of the case as made by the bill. The grounds of complaint are: 1. That the construction of the contemplated railway along Broughton and Bolton streets, will prevent free access to public sewers for the purpose of cleansing and repairing the same, and that the good health and sanitary condition of the citizens of Savannah and their families, are very greatly dependent upon the thorough drainage and sewerage of said city. 2. That there will be an invasion of certain squares in said city by horse-cars to be run on said railway, and that this will be a misapplication and abuse of them, injurious to the rights of complainants, as citizens, in said squares as places of safe and pleasant recreation and enjoyment. If these allegations present a nuisance at all, it is a *public* nuisance: Code, 2997, [2946.] The law provides the remedy for a *public* nuisance: Code, 4095, [4026.] And there is special provision made for the abatement of a public nuisance in the city of Savannah: Code, 4875, [4777 ;] *Vason vs. The South Carolina Railroad*, 42 Ga., 631. If the bill present a case of *public* nuisance, there has been condonation of it by the public authorities of Savannah. Still, were a proper case made, in proper form, on the part of the public, a Court of equity might interfere by injunction: *Mayor and Council of Columbus vs. Jacques et al.*, 30 Ga., 506. But the case is neither a proceeding to abate a nuisance, nor to restrain it in behalf of the public at large. The bill is filed by private individuals; and they allege no special damage resulting to themselves as contra-distinguished from the public at large.

3. But the allegations of the bill fail to make out a case of public nuisance. It is not averred that there will be embankments or excavations obliterating any portion of the streets. This was the origin of the nuisance recognized in *Gleason vs. the Albany and Gulf Railroad Company et al.*, 33 Ga., 615, 616, 617. It is distinctly averred that the cars are to be drawn by horses; this precludes the idea that they are to be propelled by steam; constituting the nuisance recognized by the Court in the case of 42 Ga. A railway so constructed

along the streets of a city as not to abridge the use of it for the other purposes of a street, and employed for the transportation of cars drawn by horses is not *per se* a nuisance: Drake *et al.*, *vs.* The Hudson River Railroad Company, 7 Barbour, 508, 544, 545; 9 Paige, 170. The squares in Savannah, for such use, are not to be distinguished from the streets: The S. & T. R. Co. *vs.* the Mayor, etc., 45 Ga., 606, 607.

4. But, even if there had been such allegations in the bill as could sustain the pretence of an equity, they have been sworn away by the answer and the affidavits. The affidavit of Hogg repels the averment of the location of the railway over the sewers. The affidavits of the persons owning the land called Bolton street, and of persons owning lots along the line of Habersham street, repel the assumption that the use of it for the railway will interfere with the enjoyment of the squares.

5. Assuming, then, that the plaintiff in error was constructing its railway through the streets of Savannah without authority of Legislative Act, still no case was presented by the bill which could sustain an injunction.

6. Even though there had been equity in the bill, and the parties complainant had been clothed with the right to present it, still the injunction ought not to have been granted before the question of fact involved had been submitted to a jury: Nelms *vs.* Morgan, 44 Ga., 619; 2 Green's Chancery Reports, 429. The road was designed for the public convenience, and the retaining the streets of Savannah in their actual condition was a great inconvenience. For these reasons alone, were there no others, the injunction should not have been granted: The Mayor, etc., *vs.* Georgia Railroad Company, 40 Ga., 475; Cook *vs.* The North and South Railroad Company, 46 Ga., 620.

GEORGE A. MERCER; HARTRIDGE & CHISHOLM, for defendants.

The plaintiff in error has no right under the Acts of the Legislature or the ordinance of September 29, 1873, to lay a

track through any street or square, or to use such track if laid: See Act 1868, p. 114; Revised Code, sections 4752, 4753, 4743; 11 Peters R., pp. 545, 549, 600; 40 Ga., 619, etc.; 23 Pickering R., 398; 1 Redfield on R., p. 309; Revised Code, section 753; 32 Barbour, 365, 366; 7 Ga., 221, 225; 44 *Ibid.*, 559; 45 *Ibid.*, 609; 33 *Ibid.*, 601, 608, 609, 612, 613; 1 American Railway Cas., pp. 572, 577, 578; Davis vs. Mayor, etc., 4 Kernan, (14 New York,) 519, 520.

Any citizen of Savannah has a right, under our statute, to complain of an illegal obstruction of the street. A proceeding in the name of the State would be but a matter of form, and would be proper only where all citizens of the State were equally interested. Citizens of Savannah have a special interest as such: See Revised Code, sections 2946, 4777, 4751, 4024; 40 Ga., 87; 33 *Ibid.*, 602; 45 *Ibid.*, 610, 607.

A *mandamus* would not afford adequate relief, as the road would be finished before it could be heard, and a Court of equity will always interfere where no other complete and adequate remedy is available: See Revised Code, sections 3026, 3153, 3143, 4119.

Complainants allege that they had called upon the Mayor and Aldermen, then trustees, to protect them, and they had refused to interfere. When the trustee refuses to act, the *cestui que trust* suffers a special injury: See Barbour, p. 548; 45 Ga., 607, 610; 22 *Ibid.*, 484, 485.

The complainants not only have a right, as citizens of Savannah, to complain against the construction of the road as a nuisance, but they have a further right, as corporators and tax-payers, to complain of any nuisance or abuse of corporate property or franchises. The privilege of letting or farming the right to run horse-cars on the streets is corporate property as much as the money in the treasury: See 22 Barbour, 484, 485; 15 *Ibid.*, 214, 231. Bouvier defines to farm out "to rent for a certain term:" Vol. 1, p. 575. To let, to grant the use and possession of a thing for compensation: Vol. 2, p. 27.

Complainants allege that the Mayor and Aldermen, then trustees, instead of letting the privilege for compensation, and

thus decreasing the public burdens, have not only given away this corporate property for nothing, but have relieved the plaintiff in error from taxation for four years. These allegations are not denied, and must therefore be taken as true: See Revised Code, sections 4752, 4753. The Act moreover (Revised Code, section 4755) forbids the city to depute the privilege for more than ten years, while the ordinance contains no limit as to time: See 4 Kernan, (14 New York,) pp. 532, 533. Corporators and tax-payers certainly have the right to be heard upon these points: See Revised Code, sec. 4724; 22 Barbour, 415, 484; 45 Ga., 607; 15 Barbour, 206, 212, 213, 218, 219, 230, 231; High on Injunctions, section 792; Schofield *vs.* Eighth School District, 27 Conn., 499: See opinion of Judge Cooley, vol. 5, American Law Rev. 134. Each citizen has a right to complain, though others may approve: 33 Ga., 619; and though the public may be benefited: 7 Barbour, 545; 4 Kernan, 525, 529.

McCAY, Judge.

1. The decisions of the Courts, both in England and America, are quite uniform, that in the case of a purely public nuisance, where no private person receives damage special to himself, the Courts will not interfere, either to enjoin or abate, at the suit of a private individual. The proceeding in all such cases must be in the name of the public. In England, and in most of the States, there is an information by the Attorney General, and the reason of the rule is plain. If the injury is purely a public one, it is one for the public to complain of. No private person has, or ought to have, a right to take charge of the rights of the public. A judgment, either *pro* or *con*, would bind nobody, since every other citizen has the same right to sue as the moving party, unless, indeed, the rule should exist that the first private person suing should obtain an exclusive right, and a judgment between him and the party complained of bind the world—a rule, however, that would, we think, work badly. The old rule, and one, as we have said, universally adopted, is the one we have stated.

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Kerr on Injunctions, 334 ; Waterman & Eden on Injunctions, 1 vol., 282. It was contended, in argument, that this case might fairly come within that rule which allows a tax-payer to file a bill in his own name against city authorities which are misapplying public funds, as an abuse of a trust : Dillon on M. Cor., sections 729, 730. But, so far as we can find, this privilege only extends to a misuse of public property, and there is no case where it has been extended to an obstruction or misuse of the streets, except where special damage has come to the complainant, and even then only his rights are disposed of by the judgment.

2. In this case one of the complainants is, by the amendment, alleged to be a lot owner on one of the streets. We recognize the distinction between the rights of the public and the private rights of a lot owner on the street to a free passage to and from his property on the street. This is a private right distinct from the right of the public, and a suit will lie for the protection of this right, even where the nuisance is also a public one. But the bill sets forth no damage, or threatened damage, to the lot. *Prima facie*, a street railroad, properly laid down, is a benefit instead of an injury to the property holders on the street, and it is not sufficient to justify the interference of equity, for a lot owner to charge that the railroad will injure his lot. Facts must be set forth, specifications of the injury made, so that an intelligent mind may understand how and to what extent there will be injury. The railroad company may take issue with the charge, and is entitled to details so that it may reply.

3. But we do not think the charges in this bill make out even a case of a public nuisance. A street railroad so laid as to be even with the street, and properly laid and kept in order, is no obstruction to the ordinary use of the street. As all experience shows, it is a very desirable and proper use of a street, and one that cities are every day more and more anxious for. The franchise consists rather in the right to the exclusive right to the track than in the right to lay the track.

This company has a grant from the Legislature to lay down

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a track from such point within the city to the terminus on the seaboard, by way of the cemeteries, as the City Council may prescribe. No special mention is made of streets in the charter, but the very nature of the enterprise to connect the city with the cemeteries, and the reference to the City Council for an initial point within the city, indicate to our minds a fair intent that the use of the streets for the purpose is within the scope of the charter. The right to run the road from *some* point within the city is granted by the charter. That point has been fixed by the Mayor and Council, as the Act incorporating the company provides. How are they to get from that point to the city boundary? It would be *impossible* to do this without using the streets in *some* way, either by crossing them or by running the road through them. But most fairly we think the intent of the Legislature was that, with the consent of the city authorities, the streets were to be used. Nor do we feel authorized to say that because the Act of 1866 excepted the streets having squares in them from the scheme then contemplated, the same intent is to apply to this Act. There is in the Act incorporating the Coast Line Company no restriction. The initial point is *any* place within the city consistent with the route to the coast by way of the cemeteries. The precise point is left with the Mayor and Council, and there is no limitation of the point to some street or streets not having squares. Doubtless, when the city authorities applied for and obtained the authority to lay down street rails, at first they were themselves averse to such a use of the squares; but experience and observation seem to have satisfied them that this use is not hurtful to those ornaments of the city. Another Legislature may well give a new grant. The Act of September 28, 1868, ratifying the act of the city granting privileges under the Act of December 21, 1866, to the Skidaway Company, does not, as it seems to us, have any significance on this point, since, obviously, there was no call on this ratifying Act, to go further than the city had gone, or had authority to go, in its ordinance granting to the Skidaway Company the right to connect its line with the

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streets. We can hardly suppose the Legislature to have *any* policy in reference to the squares of Savannah. Practically, this matter must always lie within the control of the city, through the Legislature. What the city, the people of the city, desire, will and ought, unless vested rights prevent, to be granted by the Legislature. And we think no argument, based on any indication of State policy, can arise.

Judgment reversed.

WILLIAM DOUGHERTY, plaintiff in error, *vs.* JACOB FOGLE,
defendant in error.

WILLIAM DOUGHERTY, plaintiff in error, *vs.* WILLIAM S.
CHIPLEY, defendant in error.

WILLIAM DOUGHERTY, plaintiff in error, *vs.* HAMPTON S.
SMITH, defendant in error.

In accordance with the opinion of a majority of this Court, in the cases known as the "tax cases," at the last term of this Court, the judgment of the Court below is reversed, on the ground that the Act of October 13th, 1870, is in violation of Article I., section 10, paragraph 1, of the Constitution of the United States.

Constitutional law. Relief Act of 1870. Before Judge HARRELL. Muscogee Superior Court. May Term, 1871.

The same point being involved in each of the above cases, they were decided together.

Suits were brought in favor of Dougherty against Fogle, Chipley and Smith, on causes of action accruing before June 1st, 1865. No affidavits as to the payment of taxes were filed as required by the Act of October 13th, 1870. Upon this ground the defendants moved to dismiss the actions. The motion was sustained, and the plaintiff excepted.

A. T. AKERMAN; A. B. CULBERSON, for plaintiff in error.

HENRY L. BENNING; R. J. MOSES; W. F. WILLIAMS,
for defendants.

McCAY, Judge.

In accordance with the opinion of a majority of this Court, in the cases known as the "tax cases," at the last term of this Court, the judgment of the Court below is reversed, on the ground that the Act of October 13th, 1870, is in violation of Article I., section 10, paragraph 1, of the Constitution of the United States.

Judgment reversed.

WENTERN AND ATLANTIC RAILROAD COMPANY, plaintiff
in error, vs. LUCIEN J. BISHOP, defendant in error.

1. When an employee of a railroad company, by special written contract, at the time he was employed, and in consideration thereof, agreed "to take upon himself all risks connected with or incident to his position on the road, and that he would in no case hold the company liable for any damage he might sustain by accidents or collisions on the trains or road, or which may result from the negligence or carelessness, or misconduct of himself or other employee, or person connected with such road, or in the service of the company:"

Held, That such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract and binding upon the employee.

2. It is the duty of a railroad company to furnish to its employees reasonably safe material and tools for their use in its service; but an employee who is aware of the dangerous character of any particular tool or instrument, and uses it, cannot, if he is damaged, have redress by an action, especially if he had agreed to take upon himself the risk of his business.
3. It was error in this case to charge the jury that if the tool or instrument by means of which the plaintiff was injured, was extraordinarily unsafe, he could recover, unless he knew of its dangerous character, at the time he made the special contract. There was, in the first place, no proof to justify the assumption that the instrument was an extraordinarily dangerous one for the purpose, nor was it necessary, in order to bring the employee within the terms of his special

50	465
89	818

50	465
116	149

50	465
117	628

50	465
118	89

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contract, that his knowledge of the nature of the instrument, should have been obtained at or before the making of the contract; it is sufficient if, at the time the instrument was used, the employee knew its nature and its dangerous character, if it was dangerous.

4. An employee of a railroad, a part of whose business was to couple cars, who was ten months in the employment of the road in that business, and who, by special contract, had taken upon himself the risks incident to his station cannot, if he be injured, escape the effect of his contract, by showing that a particular kind of link or coupler, regularly in use on the train to which he was attached, and used by him for ten months, was a less safe instrument for the purpose than other kinds of links or couplers. To make out a case of liability on the company under such a contract, it should appear that there was such gross neglect to furnish proper tools as showed recklessness of human safety, on the part of the company or its principal officers, and a want of knowledge on the part of the employee of the character of the instrument furnished, at the time he was called on to use it.

Railroads. Contracts. Negligence. Before E. M. DODSON, Esq., Judge *pro hac vice*. Catoosa Superior Court. February Term, 1873.

Bishop brought case against the Western and Atlantic Railroad Company for \$20,000 00 damages, alleged to have been sustained from injuries inflicted upon him, when in the discharge of his duties as a train hand, resulting from the defective machinery used upon the road of said defendant for the purpose of coupling cars.

The defendant pleaded the general issue, and specially that the plaintiff was one of its employees, and had previously signed a contract to take all risks incident to his employment, and that it was in consideration of said agreement that he was employed.

The evidence presented the following case: On the morning of December 6th, 1871, at Dalton, plaintiff was severely injured when attempting to couple a tender to a freight car. He was a train hand in the employment of defendant, and had been acting in this capacity for some ten months previous thereto. It was his duty to couple cars. J. R. Anderson, the conductor of the train to which he was attached, was present and directed the particular coupling at which plaintiff was

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injured, to be made. The coupling was attempted to be made with a dragbar; not a straight one, but containing a hinge. The tender was higher than the buffer on the car. The dragbar was too short; it caught upon the bottom of the opening of the car buffer, and the pressure tore the buffer loose on one side from the car and pressed it down, the hinge in the dragbar turned, and the tender passed on and mashed the plaintiff against the car. He was very seriously hurt, was unconscious for some minutes; questionable whether he will ever be perfectly sound again.

When the hinge in the dragbar turned over, it permitted the tender to pass on over the buffer of the car. This engine had been used on the road ever since plaintiff was employed. The defendant has now a different kind of coupling on the engine from that which was used when plaintiff was hurt. This coupling is regarded as unsafe and not generally used, though it was attached to other engines on the defendant's road. The plaintiff had been perfectly familiar with this species of machinery from the time he entered the service of the defendant, some ten months before, up to the time of the accident. He was about twenty-nine years of age when injured. He was receiving \$1 00 per day for his services, though they were worth \$1 25. He had been receiving \$1 25 per day, but his wages were reduced. He signed the following contract :

“OFFICE WESTERN AND ATLANTIC RAILROAD COMPANY.

“Atlanta, March 4th, 1871.

“This agreement witnesseth, that Lucien J. Bishop has, at his own request, been employed as a train hand on said railroad; and it is understood between the parties, and expressly agreed, that the said Lucien J. Bishop, in consideration that the said Western and Atlantic Railroad Company will hire and pay him the wages stipulated, will take upon himself all risks connected with or incident to his position on the road, and will in no case hold the company liable for any injury or damage he may sustain in his person or otherwise, by what

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are called accidents or collisions, on the trains or road, or which may result from the negligence, carelessness or misconduct of himself or another employee or person connected with said road, or in the service of said company. And it is further agreed, that the company is to pay the said Lucien J. Bishop for no time lost from its service by accident, disability or otherwise, but is to pay at the rate which may from time to time be agreed on, only for the service actually rendered by the said Lucien J. Bishop. In witness whereof the said Lucien J. Bishop and said company, by Joseph E. Brown, its president, have hereunto set their hands.

(Signed.) "L. J. BISHOP.

"JOSEPH E. BROWN, President

"Western and Atlantic Railroad Company.

"Witness: J. G. W. MILLS."

The jury returned a verdict in favor of the plaintiff for \$5,000 00 damages. The defendant moved for a new trial upon the following grounds, to wit:

1st. Because the Court erred in charging the jury as follows: "In construing this contract it is the duty of the Court to look to the law of the land and the surrounding circumstances. It is the duty of railroad companies, imposed upon them by law, to furnish cars, engines, machinery and fixtures, that are reasonably safe and suited for the purposes for which they are used. The road cannot legally use such machinery as to subject its employees to an unnecessary or extraordinary risk or hazard. The contract, in this case, does exempt the railroad lessees from all liability for damages which result from the use of machinery, cars, fixtures, etc., that are reasonably safe and only ordinarily hazardous; but does not apply to any case that might arise from the use of cars, engines, couplings and fixtures that are more than ordinarily unsafe and hazardous.

"If plaintiff was damaged by the use of unsafe cars, engines, couplings, etc., that are more than ordinarily unsafe and dangerous, and he was guilty of no fault or carelessness

on his part, he is entitled to the damages actually sustained by him, if the company knew or might have known, by the use of ordinary care and prudence, that they were more than ordinarily dangerous. If these facts exist, the rights of the parties are not affected by the contract. If plaintiff knew the character of the machinery, cars, etc., that he was to use, at the time he made the contract, and if he knew the engine, tender and coupling that he was to use, at the time he made the contract, then he cannot recover for damage in doing what he agreed to hazard. But it must be shown by proof that he knew the facts at the time he made the contract, and his learning the facts after the contract was made would not deprive him of his right of action."

2d. Because the jury found contrary to that portion of the charge which instructed them, that if plaintiff knew the character of the machinery, cars, etc., that he was to use, at the time he made the contract, and if he knew the engine, tender and coupling that he was to use, at the time he made the contract, then he cannot recover for damages in doing what he agreed to hazard.

3d. Because the Court erred in charging that, "if the evidence satisfies the jury that the injury complained of was caused by the defective character of the machinery or couplings provided by the defendant, and not from any negligence of the plaintiff, and if this machinery was of such character as to be dangerous to life, then the contract that plaintiff signed would not operate to relieve the defendant from liability. Railroad companies are bound to provide reasonably safe machinery, and they have not, in this case, relieved themselves from the consequences of neglect in this respect by the contract in evidence, where such neglect would be dangerous to human life or limb; this contract does not apply to such cases. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business; and where injuries to servants or workmen happen, by reason of improper and defective machinery and appliances used in the prosecution of the work,

the employer is liable; provided he knew or might have known by the exercise of reasonable care that the apparatus was unsafe."

The motion was overruled and the defendant excepted upon each of the grounds aforesaid.

B. H. HILL & SON; JESSE A. GLENN; J. A. W. JOHNSON, for plaintiff in error.

W. H. PAYNE; J. E. SHUMATE, for defendant.

McCAY, Judge.

1. We know of no law which limits the right of employer and employee to contract for themselves as to the relative rights and duties of each to the other, provided the contract be not forbidden by positive law, or be contrary to public policy. They are both free citizens. Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other freemen have in reference to their property. Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations by the parties. If one enter into the employment of another, and there be no stipulations as to wages, hours of labor, industry, etc., the law implies an obligation upon the employer to pay reasonable or customary wages, and upon the employee reasonable industry, and upon both reasonable hours of labor. It also implies various other duties and obligations; but, obviously, these are all only implications, in the absence of any agreement between the parties, and it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them

wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them upon one point, may claim to do so upon others, and thus, step by step, they cease to be free men. We do not say that employer and employee may make *any* contract: we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers and doctors—of buyers and sellers, and bailors and bailees, as of employers and employees. Will it for a moment be insisted that one who borrows a horse may not stipulate that he shall only exercise the care cast by law upon one who hires a horse? May not a warehouseman stipulate that he will take extraordinary care when the law, in the absence of such a stipulation, would cast upon him only ordinary care? May he not even stipulate that all the risk shall be upon the bailor? "*Modus et conventio vincunt legem*," is a very ancient maxim of the law, and Mr. Brown, in his Legal Maxims, says it may be regarded as the most elementary principle of law in regard to contracts. He translates it thus: "The form of agreement and the convention of parties overrule the law:" Brown's Legal Maxims, 690. And our Code, (1873) section 10, whilst it provides that laws made for the preservation of order and good morals cannot be done away with or abrogated by any agreement, yet it also declares that "a person may waive or renounce what the law has established in his favor, when he does not thereby injure others, or affect the public interest." So far as I know, this ancient rule is applicable to all the private relations in which men may place themselves towards each other. A *common carrier* is not strictly a private person. He undertakes to deal with the public, and the law considers the rules applicable to him as rules affecting the public interest. And it is upon this ground that the cases go which, while they recognize the right of a carrier to limit his liability, so far as he is an insurer, at the same time deny his right, even by special contract, to stipulate that he shall not be liable for negligence of himself or servants.

Western and Atlantic Railroad *vs.* Bishop.

In the case of *Railroad Company vs. Lockwood*, 17 Wallace, 375, this subject, as to common carriers, is very fully discussed, and the authorities *pro* and *con*, examined and commented upon. The Court decided that a common carrier could not stipulate for non-liability for his own negligence, or the negligence of his servants. But the whole case turns upon the nature of a common carrier's undertaking, that it is a public employment, that care and diligence are the essential duties of his undertaking, that the carrier and his customer do not stand on an equal footing. For these reasons, the contract of a common carrier is an exception to the general rule, "that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to contract." None of this reasoning applies to the case before us. This suit is not against the railroad company as a carrier. The husband of the plaintiff was one of the agents by whom the defendant was exercising the employment of a common carrier. His relation to the company was strictly a private one. His contract of service was a free one. He did not stand in the situation of a traveler, or shipper of goods, "who cannot stop to higggle, or refuse to go on, or to ship his goods." The railroad company has no monopoly of service. It is only one of a million of employers with whom the husband of the plaintiff might have sought employment. He deliberately, and for a consideration, undertook what he knew to be a dangerous service, and contracted that he would not hold the company liable for the negligence of its servants, or even for the negligence of the company itself.

2, 3 and 4. We recognize, however, one limitation to this agreement, and that is the limitation the law puts upon all contracts. No man can stipulate for immunity in case he should do an act that is a crime. No contract is a good one that is in violation of law, that is which the law forbids, or which is against good morals, or contrary to public policy: Code of 1873, sections 2749, 2750. Nothing in this contract can, therefore, protect the company when the negligence which

has caused the damage is a crime, when it comes within that kind of negligence, which is called, in section 4291 of the Code (1873,) criminal negligence, recklessness of human safety and human life. That sort of negligence is forbidden by law and punishable by law as penal. It is contrary to good morals and to public policy as declared by law. As the evidence in this case entirely fails to make a case of criminal negligence on the part of the railroad company or its agents, we think the verdict is wrong. It may be that the link used by the railroad is not as good a link as some others, and were this a question between a passenger and the road, the fact that the tool is not of the most approved character, would be of great importance. But to enable an employee to recover without such a contract as this he must be without fault. Is a man without fault who uses a dangerous and unsafe tool, knowing it to be so? Can a man claim that he has been damaged by the fault of other employees who have furnished an unsafe tool, when he has for months used that tool, knows its unsafeness, and still runs the risk? An employee is not without fault, that is, he is a contributor to his own hurt, if, however negligent others may be, knowing that negligence, seeing the danger, he still chooses to expose himself to the danger. A car coupler is, as we suppose, employed in a dangerous business; he knows it, and if he undertakes to couple a car, with full knowledge that there is extra danger arising from the negligence of somebody else, he is not without fault. It seems to us absurd to say that a man shall use a tool daily for ten months in his own special employment, and then claim that he is hurt without fault of his own, and by the negligence of others, in consequence of the unfitness of that tool for the purpose. We are ready to hold railroad companies to the duties the law casts upon them. But juries should remember that before the law, the rich and the poor, the strong and the weak, have equal rights.

Judgment reversed.

SARAH F. ROSE, plaintiff in error, vs. WILLIAM D. WEST,
defendant in error.

1. When a bill was filed to recover of the defendant a parcel of land, and the sole ground for coming into equity was the allegation that the rents and profits were of great value, and the defendant was insolvent, and the Chancellor was asked to appoint a receiver, and impound the rents and profits until a hearing could be had and a decree rendered, and the prayer for the appointment of a receiver was not insisted on, either in vacation or at the first term, by any motion to grant the prayer :

Held, That the defendant might, even at the second term, move to dismiss the bill for want of equity.

2. When on the trial of a bill to recover the possession of a parcel of land, the defendant disclaimed title to the land sued for, and denied possession of the same at any time, and the parties went to trial on the issue as to *mesne* profits alone, and it appeared that the complainant claimed under a deed from the defendant, which he sought to prove included the land sued for, although the description in the deed showed that if such was the intention there was a mistake in the deed :

Held, That it was improper to allow the jury to consider the question of mistake without some allegations in the bill charging such mistake and praying relief on that ground.

3. Whether the defendant was indebted for *mesne* profits or not depended entirely on whether she was in possession of plaintiff's land, and this was, as the pleadings stood, dependent on the plaintiff's deed and on the description of the land therein. If that was a mistake, such mistake should have been charged in the bill, so that the true rights of the parties might be ascertained and decided.

4. We think Mrs. Rose was a competent witness in this case in the issue before the jury, to-wit: the *mesne* profits, even though Henderson was dead.

5. Any admissions by the grantor in a deed going to show a mistake in the deed, are good evidence against the grantor, but such admissions are not conclusive unless acted on by the party seeking to prove them.

6. We think, in this case, that the true issues between the parties have not been fairly passed upon, and that a new trial should be had, so that, after proper amendments, the whole matter may be fully inquired into, and the rights of the parties be settled.

Equity. Mistake. *Mesne* profits. Witness. Admissions.
New trial. Before Judge HOPKINS. Fulton Superior Court.
April Term, 1873.

West filed his bill against Rose, making, substantially, the following case :

On November 5th, 1866, the defendant being possessed, in her own right, of all that tract or parcel of land, situate, lying and being in the fourteenth district of originally Henry now Fulton county, known as city lots numbers nineteen and twenty, being part of land lot number eighty-three, each lot fronting on Rock street, in the city of Atlanta, one hundred feet, and running back, in parallel lines at right angles to said street, two hundred feet, more or less, sold and conveyed said property to one James C. Henderson. On January 18th, 1867, complainant purchased from said Henderson a portion of said property, described as follows: "Part of city lot number twenty, in the city of Atlanta, county of Fulton, fronting on Rock street fifty feet, running back two hundred feet, more or less, containing one-fourth of an acre, more or less, bounded on the north by land of J. C. Henderson, and on the south by that of C. Sherwood." Complainant paid \$600 00 to Henderson for said lot, and was placed in immediate possession of the same. This purchase was made in good faith, and without any notice, actual or constructive, of any claim to said lot. On March 14th, 1870, complainant was in possession of said lot by his tenant, John Downdes, when the defendant sued out the usual proceedings against complainant as an intruder, placed the warrant in the hands of the sheriff of said county, and said sheriff, the defendant and her attorney, went to said lot in the night time, in the midst of a storm of rain and sleet, and without authority of law, either by menaces, threats, or by collusion with said Downdes, induced him to attorn to defendant, he never having been actually ejected from said premises. On the succeeding day the defendant took possession in person. On June 4th, 1870, complainant instituted proceedings against said defendant as an intruder. She made the usual counter-affidavit, and the papers were returned by the sheriff to the Superior Court. It will thus be seen that the defendant has been illegally and wrongfully placed in possession of complainant's property, under color of a statutory proceeding, which was a mere nullity as against his tenant. Complainant will, without the interposition of the

Rose vs. West.

Court, be forced to sue for the same in a tedious action of ejectment, which, owing to the large amount of business on the dockets of the Superior Court, will last for several years, during which time the *mesne* profits of said property will be enjoyed by the said defendant. The property is worth \$15 00 per month rent. The defendant is insolvent and cannot be made to respond in damages, or for said *mesne* profits in the event complainant should be successful in said action of ejectment. The claim of defendant to said property is frivolous and without reason, and as complainant is obliged eventually to recover, the only real question is whether she will be allowed to enjoy the *mesne* profits under the aforesaid circumstances, pending the litigation. Complainant also fears that said defendant will further embarrass the enforcement of any order that may be had herein, in and about said property, by applying to have the same set apart to her as a homestead.

Prayer, that the defendant be enjoined from seeking to have said property set apart as a homestead, and from taking any steps to affect the title or possession of the same; that a receiver be appointed and placed in possession of said property, with instructions to rent the same to the best advantage, and to hold the proceeds subject to the order of the Court; that upon a final hearing complainant be restored to the possession of his said property, that his title may be by decree confirmed, and that the defendant be perpetually enjoined from disputing complainant's title. That such further relief be granted as the nature of the case may require; that the writ of subpoena may issue.

At the first term of the Court (November term, 1870) the defendant filed her answer, in which she alleged that the deed from her to Henderson was fraudulently obtained, and that she was not in the possession of the property conveyed by Henderson to complainant. At the July term, 1870, she filed a formal disclaimer of title.

It did not appear that the prayer for the appointment of a receiver had been insisted on by motion at any time from the filing of the bill to the final trial.

Upon the trial the defendant moved to dismiss the bill for want of equity. The motion was overruled and the defendant excepted.

As the defendant had disclaimed title to the property covered by the deed under which complainant claimed, the attempt was made to recover said land and *mesne* profits, under said bill, by showing that the deed from the defendant to Henderson and the deed from Henderson to complainant were intended to cover said lot in possession of and claimed by defendant, and that the description therein contained failed to do so by mistake. No amendment was offered to the bill, but the case, as then presented by the pleadings, went to trial upon the issue of mistake.

The evidence is unnecessary to an understanding of the decision.

The jury returned the following verdict :

"We, the jury, find for complainant with the rent at the rate of \$15 00 per month, from the time she was put in possession, which was March 8th, 1870 ; and we further find that the defendant was in possession of said property at the commencement of this suit, being the same where the defendant now resides, and we further find that the complainant is entitled to immediate possession.

"JOSEPH THOMPSON, Jr., *Foreman*."

The defendant moved for a new trial upon the following, among other grounds :

1st. Because the Court erred in overruling the motion to dismiss complainant's bill for want of equity.

2d. Because the Court erred in holding the defendant to be an incompetent witness as to the *mesne* profits, on the ground that James C. Henderson was dead.

3d. Because the Court erred in the following charge to the jury : "Inquire if there was a deed made by Mrs. Rose to Henderson for property, then whether part of that property transferred from Mrs. Rose to Henderson was conveyed by him to complainant West, and whether it is now the pro-

perty in dispute. If you find she had title and conveyed it by deed to Henderson, and he conveyed it by deed to this complainant, that would entitle him to recover the property from her in the absence of a defense."

4th. Because the Court erred in the following charge to the jury: "Look to the deed from Henderson to West, complainant; see to the description of the property which he claims to have purchased from Henderson; then look to all the testimony in the case, no matter from whom it comes, and see what property, what particular piece of land that description in the deed was intended by the parties to apply to; see to what piece of land they intended, at the time, that description should apply."

5th. Because the Court erred in continuing the foregoing charge to the jury, as follows: "When you have ascertained that, see whether that piece of property is embraced in the deed said to have been made by Mrs. Rose to Henderson; and if it is that piece of property, complainant would have the right to recover."

6th. Because the Court erred in the following charge to the jury: "Does the proof show that at the commencement of this suit Mrs. Rose was in possession of that property, of that particular piece of land to which the parties intended that description to apply; if it does, and is embraced in the deed from Mrs. Rose to Henderson, and from him to West, he would have the right to recover."

7th. Because the Court erred in the following charge to the jury: "Papers have been admitted which it is said contain admissions or statements of Mrs. Rose in reference to the property; this testimony is not admitted for the purpose of proving title to property out of her. Look to the deeds, the titles, for that; the papers are admitted for the purpose of throwing light on the inquiry as to what the parties intended these descriptions to apply."

8th. Because the Court erred in refusing the following charge: "That the description of property in the pleadings and affidavits made by Mrs. Rose are not evidence of title; nor are

any admissions or statements made by her touching the lots, or numbers of lots, evidence of title against her, nor will they estop her, if they were not made to the plaintiff by her and acted upon by him."

The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

COLLIER, MYNATT & COLLIER; THRASHER & THRASHER, for plaintiff in error, cited Code, sec. 3735; 38 Ga., 46.

HILLYER & BROTHER, for defendants.

1st. On motion to dismiss: Code, secs. 3026, 3040, 3115, 3121, 3045, 265, 3043, 4132, 4133, 4141; 7 Ga. R., 242; 27 *Ibid.*, 233; *Ibid.*, 352; 32 *Ibid.*, 257; 37 *Ibid.*, 335; 36 *Ibid.*, 595; 3 *Ibid.*, 117; 39 *Ibid.*, 421; *Ibid.*, 342.

2d. On subject of admissions of Sarah F. Rose: Code, secs. 3731, 3732, 3738; 17 Ga. R., 449.

3d. Discretion of Judge in refusing new trial not controlled: 40 Ga. R., 135; 37 *Ibid.*, 258; *Ibid.*, 235.

McCAY, Judge.

We recognize the general rule laid down by this Court in *Hargroves vs. Jones*, 27 *Georgia*, 233, that a demurrer to a bill, on the ground that the complainant has an adequate remedy at law, cannot be put in at the trial term. But that is a mere rule of practice, and cannot apply to a case where the plaintiff had, at the appearance term, equity in his bill, and which he had abandoned before and at the trial term. The only reason presented in the original bill to justify equitable interference was the allegation of the valuable rents, the insolvency of the defendant, and the prayer for the impounding of the rents to await the final hearing. At the first term that petition was a pending petition; there might be, under the charges of the bill, a necessity for the action of the Court, and at that time there was no remedy at law for what the complainant desired. But for some reason, the first term and the intervening vacation was allowed to pass and no motion made,

or proceeding had, to treat as a serious thing the only charges in the bill that justified the interference of chancery in the dispute between the parties. At the trial term, or at any rate when the case was called, the petition for a receiver was absurd. Before the receiver could take possession, the necessity for his appointment would cease; certainly before any rents could accrue, this would be so. We think, therefore, under the peculiar facts of this case, the motion to dismiss was not too late. But, as the bill might have been, and still may be, amended so as to charge a mistake in the deed to Henderson and pray a reformation, we do not think the decision of this point covers the case.

On the issue on trial Mrs. Rose was a competent witness, notwithstanding the death of Henderson. The debt for *mesne profits*, if it existed, was a debt from her to West, implied from her possession of West's land; or if it be considered damages for trespass the wrong is to West. She could not testify as to facts transpiring between her and Henderson at the making of the deed, since she is a party to the deed, and Henderson, West's warrantor, is dead. But she may be a witness in the issue as it arises between her and West. She may explain, if she can, the acts of admission which are proven against her, and she may testify to any transactions since the date of the deed to West, bearing upon the rights which West may have, which Henderson does not have.

We do not think the real rights of the parties have been fairly heard and passed upon. This verdict is only sustainable as the pleadings stand on the idea that the deed to Henderson covers the land in dispute, by the *words in which it describes* the land it conveys. If the jury have treated the deed to Henderson as a mistake, if they have found this verdict on the ground that though the Henderson deed does not, by its words, convey this land, yet that such was the intent of the parties, the verdict is wrong. We think the charge of the Court was calculated to authorize the jury to do this, and we feel, in reading over the testimony, that they must have done this.

Cogswell vs. Schley.

The distinction taken in the argument between a misnomer of the land, calling it by a wrong number and a mistake, though plausible, is not sound, at least it is not probable the jury were so nice in their discrimination.

The case ought to be tried on proper allegations of a mistake in the deed. It is clear to us from the testimony, that the deed to Henderson does not, by its words, convey this land, and we are strongly inclined to the opinion that it was the intent of the parties to it that it should do so. If it was fraudulent it cannot be reformed, except in favor of one who has been misled by Mrs. Rose's own acts.

We express no opinion as to how West stands in this respect. There may be something in the fact that Henderson had possession of this particular land under the deed, by Mrs. Rose's consent, and this might be a strong element of equity in West's favor. At any rate, we think there ought to be a new trial, when the real dispute shall be fairly heard, not on matters of pleading, but on the real, legal and equitable rights of the parties.

Judgment reversed.

MITCHELL COGSWELL, relator, vs. WILLIAM SCHLEY, Judge,
respondent.

1. Where it appears from the minutes of the Superior Court of Chatham county, that on the 7th of July said Court was in legal session, Judge Schley presiding; that said Judge adjourned the Court until ten o'clock the next morning; that he had arranged with Judge Harris, of the Brunswick Circuit, then to hold the Court; that Judge Harris telegraphed, on the 8th day of July, from Augusta, that he was providentially detained; that the clerk adjourned the Court from day to day until the 11th of July; that, in the meantime, to-wit: on the 8th of July, Judge Schley ordered that if Judge Harris did not come by the 10th, the clerk should adjourn the Court until the 14th of July, which was accordingly done; that the Court convened on the 14th, Judge Schley presiding, and had been in session ever since:

Held, That the session was legal. (R.)

Cogswell vs. Schley.

2. A prisoner may be sentenced for the offense of murder, under section 4574 of the Revised Code, in vacation. (R.)

Mandamus. Superior Court. Adjournment. Criminal law. Practice. Before the Supreme Court. July Term, 1873.

For the facts of this case, see the opinion.

A. P. ADAMS, for the relator.

No appearance for respondent.

McCAY, Judge.

This was an application for a *mandamus* to compel the Judge of the Superior Court of Chatham county to certify a bill of exceptions.

It appears that Cogswell had been sentenced to be hanged ; that the sentence had been superseded by motion for a new trial, which new trial was finally refused ; that before the final judgment, the day fixed in the sentence for the execution had passed. A *habeas corpus* was sued out by the Solicitor General, under section 4574 of Irwin's Revised Code, and Cogswell brought before the Judge to be resented. His counsel objected that the *Superior Court* was not in session, which objection the Court overruled, and proceeded to pass a sentence.

It appears from the minutes of the Court that on the 7th of July, the Superior Court of Chatham county was in legal session, Judge Schley presiding ; that he adjourned Court until ten o'clock next morning ; that he had arranged for Judge Harris, of the Brunswick Circuit, to hold the Court, and to sit next day ; that Judge Schley was, on the 8th of July, at Brunswick ; that Judge Harris did not appear, and on the 8th of July telegraphed, from Augusta, that he was detained from providential cause ; that the clerk adjourned the Court from day to day until the 11th of July ; that, in the meantime, to-wit: on the 8th, Judge Schley ordered that if Judge Harris did not come by the 10th, the clerk should adjourn the Court until the 14th of July. Judge Harris did not come, and the clerk adjourned the Court, as Judge Schley directed, until the

Lathrop & Company vs. Kemp.

14th of July, at which time *Judge Schley* appeared, and the Court had been in session ever since.

After considering the facts set forth in the petition, it is adjudged by this Court that the *mandamus nisi* be refused.

1. Because, according to the record, the Superior Court of Chatham county was legally in session on the day of the passing of the sentence excepted to.

2. Because said sentence might, under section 4574 of the Revised Code, be passed by the Judge in vacation.

J. W. LATHROP & COMPANY, plaintiff in error, vs. J. W. KEMP, sheriff, defendant in error.

1. Service of the bill of exceptions by an attorney must be verified by the affidavit of such attorney at the time the service is made. (R.)
2. Such defective service cannot be cured by the affidavit of the attorney made in this Court. (R.)

Bill of exceptions. Practice in the Supreme Court. Before the Supreme Court. July Term, 1873.

When this case was called, counsel for defendant moved to dismiss the writ of error on account of want of service of the bill of exceptions. The only evidence of such service was the following entry:

"I have this day served J. W. Kemp, in person, with a copy of the within bill of exceptions. May 3d, 1873.

(Signed)

"L. P. D. WARREN,

"Attorney for J. W. Lathrop & Company."

Mr. Warren proposed to authenticate the service by his affidavit. The Court refused to allow this, and dismissed the case, establishing the principles announced in the foregoing head-notes.

WARREN & ELY, for plaintiffs in error.

G. J. WRIGHT, for defendant.

Walker vs. Whitehead.

JAMES B. WALKER, plaintiff in error, *vs.* **WILLIAM H. WHITEHEAD**, defendant in error.

Where the judgment of this Court has been reversed upon writ of error to the Supreme Court of the United States, the judgment of said trial will, on motion, be made the judgment of this Court. (R.)

Practice in the Supreme Court. Before the Supreme Court.
July Term, 1873.

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This case was carried by writ of error to the Supreme Court of the United States where the judgment of the Supreme Court of Georgia was reversed. Counsel for plaintiff in error moved to have the judgment of reversal made the judgment of this Court. The motion was resisted upon the ground that the judgment of this Court was final as between the parties to this case, whatever might be the effect of the judgment of the Supreme Court of the United States in establishing principles for the control of other cases. The objection was overruled, and the following order was passed:

"Whereas, the above case was carried to the Supreme Court of the United States by writ of error to this Court, and the foregoing judgment was had reversing the judgment of this Court; upon motion of Hines & Hobbs, of counsel for plaintiff in error, it is ordered that the foregoing judgment of the Supreme Court be made the judgment of this Court; and the judgment of the Superior Court of Baker county, Georgia, be reversed, and said case reinstated and proceed according to law. And that the said James B. Walker recover of the said William H. Whitehead the sum of \$59 98 costs in the Supreme Court of the United States, and \$....., to be taxed by the clerk of this Court as costs in this Court."

HINES & HOBBS, for the motion.

RICHARD F. LYON, contra.

Brown vs. Patterson.—Shealy vs. McClung & Dykes.

JOHN T. BROWN, plaintiff in error, vs. ROBERT M. PATTERSON, defendant in error.

1. Where, upon a motion for a new trial, it was agreed that the documentary evidence introduced should be used on said motion, and it appears that said evidence was in the clerk's office, and a copy thereof was not transmitted to this Court as a part of the record, the case will be continued upon a suggestion of the diminution of the record. (R.)
2. The suggestion of a diminution of the record must be made under oath, in writing, on or before the calling of the case as prescribed by Rule IX. of this Court. This rule will be strictly enforced. (R.)

When this case was called, counsel for plaintiff in error suggested a diminution of the record on account of the absence of a copy of the documentary evidence used on the hearing of a motion for a new trial.

It was objected, on the part of the defendant in error, that such defect could not be cured in the manner proposed.

It appeared that the following agreement was entered into on the hearing of the motion for a new trial:

"We agree to the foregoing brief of the oral evidence, and consent that the documentary evidence may be used on this motion for a new trial."

Also, that said evidence was in the clerk's office, it being a bill and answer in an equity cause.

The record was ordered to be completed and the case continued, the Court enunciating the principles contained in the above head-notes.

HAWKINS & HAWKINS, for plaintiff in error.

J. A. ANSLEY; RICHARD F. LYON, for defendant.

MARTIN L. SHEALY, plaintiff in error, vs. McCLUNG & DYKES, defendants in error.

1. Where the acknowledgment of service on the bill of exceptions antedates the certificate of the Judge thereto, the writ of error will be dismissed. (R.)



Green vs. Stringfellow *et al.*

2. The acknowledgment of service upon the bill of exceptions cannot be shown to bear a wrong date by *aliunde* proof. (R.)
3. An acknowledgment "of due and legal service," and a waiver "of copy and all other and further service," does not cure a defective service, which arises from the fact of an attempted service before the certificate of the Judge was attached to the bill of exceptions. (R.)

Practice in the Supreme Court. Before the Supreme Court.
July Term, 1873.

When the above stated case was called, counsel for defendants moved to dismiss the writ of error for want of service of the bill of exceptions. The certificate of the Judge was dated June 13th, 1873. The only evidence of service was the following acknowledgment :

"We acknowledge due and legal service of the within bill of exceptions, waiving copy and all other and further service. This 12th of June, 1873.

(Signed) "COOK & CRISP, Defendant's attorneys."

Counsel for plaintiffs in error proposed to show by his own affidavit, that the date of the acknowledgment of service was a mistake; that such acknowledgment was, in fact, given subsequent to the certificate of the Judge. This the Court refused to permit. He then insisted that if the service was defective, it was cured by the terms of the acknowledgment.

The Court ordered the writ of error dismissed.

J. R. WORRILL, for plaintiff in error.

COOK & CRISP, for defendants.

RICHARD ROE, casual ejector, and ROBERT B. GREEN, tenant in possession, plaintiffs in error, vs. JOHN DOE, *ex dem.* HENRY STRINGFELLOW *et al.*, defendants in error.

1. Where an instrument is produced, signed by the plaintiff in error, stating that the case was carried to this Court without authority from him, and consenting to its dismissal, his counsel will not be permitted

Walker *et al.* vs. Smith.

to proceed with said litigation for the recovery of their fees, except upon showing that the case had been settled by the defendants in error with notice of the contract under which they were to be compensated. (R.)

2. Knowledge that the movants were of counsel, and that their client was insolvent, is not such notice. (R.)

Fees. Settlement. Notice. Practice in the Supreme Court. Before the Supreme Court. July Term, 1873.

When the above stated case was called, counsel for defendants in error produced a written statement from the plaintiff in error to the effect that said cause was carried to this Court without his consent, and authorizing its dismissal. Counsel for the plaintiff in error objected to the dismissal, upon the ground that they had the right to proceed with the litigation for the recovery of their fees, as the defendants had settled the case with notice that they were of counsel, and that their client was insolvent.

The Court held that the notice of the contract for fees was not sufficient to bind the defendants. The case was dismissed.

RUSSELL & RAIFORD; W. A. FARLEY, for plaintiff in error.

JOHN PEABODY; D. H. BURTS, for defendants.

ANDREW W. WALKER *et al.*, plaintiffs in error, vs. ROBERT P. SMITH, defendant in error.

1. The date of the entry, by the clerk of the Superior Court, of the filing in office of the bill of exceptions, cannot be shown to be erroneous by extraneous testimony. (R.)
2. If the date of the filing of the bill of exceptions in the clerk's office of the Superior Court is incorrect, the proper remedy is by writ of *mandamus*, to be applied for to the Judge of the Superior Court. (R.)

Practice in the Supreme Court. Bill of exceptions. *Mandamus*. Before the Supreme Court. July Term, 1873.

Walker *et al.* vs. Smith.

When the above stated case was called, counsel for defendant moved to dismiss the writ of error, because the entries upon the bill of exceptions show that it was certified to by the Judge on January 28th, 1873, and not filed in the clerk's office of the Superior Court until February 16th, 1873, after the lapse of more than fifteen days. Counsel for plaintiffs in error proposed to show, by the affidavits of counsel and of the clerk, that the date of the entry of the filing in office was incorrect; that the bill of exceptions was in fact filed within fifteen days from the date of the certificate of the Judge thereto. This the Court refused to allow. Counsel then proposed to apply for a *mandamus nisi* against said clerk. This the Court also refused to permit. The writ of error was ordered to be dismissed, the Court enunciating the principles embraced in the above head-notes.

SPEER & STEWART; C. PEEPLES; E. W. BECK, for plaintiffs in error.

D. J. BAILEY; Z. D. HARRISON, for defendant.

THE COMMISSIONERS OF ROADS AND REVENUE FOR FLOYD COUNTY, plaintiffs in error, vs. ALFRED SHORTER, defendant in error.

1. In 1857 the Legislature passed an Act making the county of Floyd a corporation, and declared that it should be represented in its corporate capacity by the Inferior Court of said county. The Act further provided that, on the first Monday in February, 1858, or at any time thereafter which shall be determined, ordered and published by the Inferior Court, the people of the county should vote on the question of subscription or no subscription, and that the returns of the election should be made to the Justices of the Inferior Court, who shall consolidate the same and enter the result upon the minutes of the Court. The Act further provided that if a majority of the votes should be for subscription, the Inferior Court should subscribe not less than fifty nor more than one hundred thousand dollars of stock in the Georgia and Alabama Railroad, and issue bonds of the county of Floyd therefor to said company in payment of stock, payable not exceeding ten years from date, bearing seven per cent. interest, payable semi-annually at such place as the said Inferior Court may determine. In October, 1859, the Inferior Court passed an order reciting that it deemed it for the interest of the county that said road should be built, and ordering the election, as provided. Due notice was given; the election had, the returns made, consolidated, and the result entered on the minutes. Thereupon, without any further entry on the minutes, a majority of the Justices agreed among themselves to subscribe, proceeded to the company's office and did subscribe for \$75,000 00 of stock, and issued bonds as called for to the amount of \$25,000 00. Each Justice signed the subscription in the absence of the others, and also signed his name to the bonds in the absence of the others. The bonds were made payable to Alfred Shorter, President of the Georgia and Alabama Railroad Company, or order, and having been by him indorsed, were in the hands of the plaintiff as holder:

Held, That when the election was duly had, and the result entered on the minutes, the authority of the Inferior Court to make the subscription and issue the bonds was complete, without any further entry or order of the Court that it would make the subscription.

2. By the words "Inferior Court" in the Act, the Legislature meant the "Justices of the Inferior Court," or "the Inferior Court for county purposes," and not the Inferior Court proper sitting twice a year as a Court of law under the existing Constitution of the State.

3. However proper for public information and for the regularity of business it would have been that the minutes of the Inferior Courts should show that the subscription was made and the bonds issued, with full details of the whole transaction, yet, when the result of the election

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was put upon the minutes, as the Act required, the authority of the Court to make the subscription and issue the bonds was complete, and under the uniform practice of the "Justices of the Inferior Court" in this State, in making contracts within the scope of their authority, it was competent for the Justices to make said subscription and sign and issue said bonds when they were not regularly in session as a Court. And it appearing that a majority of the Justices did, in fact, sign said subscription, officially, and sign and issue the said bonds as "Justices of the Inferior Court" of Floyd county, the bonds are binding upon the county, especially in the hands of third persons, *bona fide* holders thereof.

4. The indorsement on the bonds by "Alfred Shorter, President Georgia and Alabama Railroad Company," passed the title in the bonds to the holder. The bonds being issued for purposes of negotiation, this was a sufficient indorsement to put them in circulation, notwithstanding the charter of the railroad company required a different mode of making and signing ordinary contracts to bind the company.

County matters. Inferior Court. Corporations. Railroads. Indorsement. Before Judge McCUTCHEM. Floyd Superior Court. July Adjourned Term, 1872.

Alfred Shorter petitioned the Judge of the Superior Court of the county of Floyd for the writ of *mandamus*, to be directed to the Commissioners of Roads and Revenue for said county, alleging as follows:

He represents to the Court that he is the owner, in his own right, of five bonds of the county of Floyd, issued on the 10th day of September, 1860, numbered from eleven to fifteen, inclusive, each for the sum of \$1,000 00, due on the 1st of July, 1870, commonly called coupon bonds; and, as executor of Elizabeth Cooley, he holds one other bond of said county for the same amount, numbered twenty-three, issued on December 31, 1860, and due January 1, 1871. Each of the said six bonds is as follows, except as to dates and number:

"\$1,000 00. No. ROME, GEORGIA,, 1860.

"On the day of 187..., the county of Floyd promises to pay to Alfred Shorter, President Georgia and Alabama Railroad Company, or order, at the Importers' and

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Traders' Bank, New York City, the sum of one thousand dollars, with seven per cent. interest thereon, from this date, payable at the same place, on the first day of January next, and semi-annually thereafter, on surrender of the annexed corresponding coupons.

"And it is hereby contracted with the holder of this bond that ten shares, of one hundred dollars each, of the stock of the county of Floyd in the Georgia and Alabama Railroad Company shall stand pledged as collateral security for the payment of this bond. And it is hereby stipulated that no transfer will be made of said stock without the consent of the bondholders, or the redemption of an amount of the bonds thus secured equal to the amount of stock thus transferred.

"Done by virtue of an Act of the General Assembly of the State of Georgia, passed December 22, 1857.

"JOHN R. TOWERS, J. I. C.,

"CHARLES H. SMITH, J. I. C.,

"SAMUEL MOBLEY, J. I. C."

The bond of the Cooley estate is payable at the "Branch Bank of the State of Georgia at Augusta, Georgia."

Each of the bonds has written on the back of it the words, "Alfred Shorter, President of the Georgia and Alabama Railroad Company."

Attached to them, when issued, were twenty coupons, numbered from one to twenty, consecutively, and falling due successively on each 1st of January and 1st of July during the ten years to the maturity of the bond. Each coupon is as follows, except as to number and time when due :

"\$35 00.

No.

"Warrant for thirty-five dollars due by the county of Floyd on the 1st day of, 18..., for six months' interest on bond No.

"JOHN R. TOWERS, J. I. C.,

"CHARLES H. SMITH, J. I. C.,

"SAMUEL MOBLEY, J. I. C."

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The petition states that the first five coupons of each of the bonds of Shorter, and the first four of the bond of the Cooley estate, have been paid. The balance are unpaid.

Said bonds and coupons have come to the holder in usual course of trade, and for a valuable consideration. They were issued in payment of a subscription by the county of Floyd to the stock of the Georgia and Alabama Railroad Company. The issue of said bonds was authorized by an Act of the General Assembly, which is as follows:

“An Act to authorize the county of Floyd to aid in constructing the Georgia and Alabama Railroad, by the subscription for stock and the issue of bonds therefor, upon a vote of the citizens of said county.

“SECTION I. *Be it enacted*, That the county of Floyd shall be a corporation, with all the necessary powers, for the purposes of this Act, and shall be represented in its corporate capacity by the Inferior Court of said county.

“SEC. II. *Be it further enacted*, That on the first Monday in February, 1858, or at any time thereafter which shall be determined, ordered and published by the Inferior Court, giving at least thirty days' notice thereof, the legal voters of Floyd county shall assemble at the Court-house and the election precincts in said county, and vote “county subscription,” or “no county subscription.” The election shall be held and conducted in the same manner as elections are required to be held for county officers, and the returns shall be made to the Justices of the Inferior Court, who shall consolidate the returns and enter the result upon the minutes of Court, and if a majority of the votes so cast shall have been for “county subscription,” then the Inferior Court shall subscribe not less than \$50,000 00 nor more than \$100,000 00 to the capital stock of the Georgia and Alabama Railroad Company, and shall issue bonds of Floyd county therefor to said railroad company in payment for said stock, at par value, in amounts not exceeding \$1,000 00 each, payable not ex-

ceeding ten years from date, bearing interest at seven per cent. per annum, and said interest payable semi-annually, at such place or places as the said Inferior Court shall determine.

"SEC. III. *Be it further enacted*, That the capital stock so subscribed by the county of Floyd, and the resources arising from the county tax shall be pledged for the redemption of the said bonds, and said stock shall not be used for any other purpose, and all dividends arising from said stock shall be appropriated to the payment of said bonds.

SEC. IV. *Be it further enacted*, That the Inferior Court of Floyd county shall assess and collect a county tax of such per cent. upon the State tax as shall be sufficient to pay the interest semi-annually due, and to protect the credit of the county, and should it be necessary, after applying the stock so subscribed to the redemption of the bonds, to raise any amount for a balance due, the said Court may order and assess such tax as may be necessary to fully redeem said bonds and the unpaid interest due thereon.

"Assented to December 22d, 1857."

The petition then states that an election was held in pursuance of said Act, and resulted in favor of the subscription, and that the Inferior Court did make the subscription on the, and afterwards issued the bonds aforesaid, and others in part payment thereof.

The interest due has been demanded "of the county of Floyd," and payment refused, and the Commissioners of Roads and Revenue refuse to levy a tax to pay the said coupons due and to become due. He, therefore, prays for *mandamus*, etc.

Mandamus nisi granted at Chambers, December 15, 1869, by F. A. Kirby, Judge, etc.

The Commissioners of Roads and Revenue answered as follows :

1st. That all the coupons which had matured more than twelve months before their presentation for payment, were barred by limitation.

2d. That the records and minutes of the Inferior Court nowhere show that said Court ever authorized or directed any subscription to the stock of the Georgia and Alabama Railroad Company; nor do they anywhere show that said Court ever authorized or directed the issue of bonds in payment for such stock.

3d. Respondents are informed, and believe it to be true, that the bonds and coupons referred to in the petition were signed by those whose names appear thereto, at different times and places, and when no three of them were together, and at times and places when the Inferior Court was not in session.

4th. The minutes and records of the Inferior Court do not show that any person was ever authorized to subscribe for stock, or to sign bonds or coupons for the purposes designated, nor that the Court itself ever did either of these things.

5th. Respondents are advised that the issue of said bonds and coupons was illegal, and that the county is not liable to pay the same.

Issue having been joined on the answer, evidence was introduced by the relator as follows:

First, the six bonds, with the coupons attached, as heretofore copied and set forth in the petition. Next, the following certified abstract from the minutes of the Inferior Court:

“OCTOBER 19, 1859.

“*Inferior Court of Floyd county, in session for a special county purpose.*

“Ordered by the Court that we deem it for the interest of the county of Floyd that a railroad be built from the city of Rome in the direction of Dalton and Gadsden, under the charter organizing the Georgia and Alabama Railroad Company. We, therefore, in compliance with and by authority of the Act of December, 1857, do hereby order and determine that an election shall be held at the Court-house and election precincts in the county, on the 22d day of November next, and the vote to be taken by ballot, ‘county subscription’ or ‘no county subscription,’ and that notice of said election be

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advertised in the Southerner, in compliance with and according to said Act.

"CHARLES H. SMITH, J. I. C.,

"J. R. TOWERS, J. I. C.,

"SAMUEL MOBLEY, J. I. C."

"GEORGIA—FLOYD COUNTY:

"We, the undersigned, do certify that we have consolidated the returns as made to us by the managers of an election held on the 22d day of November, 1859, by virtue of an Act of the Legislature, passed the 22d December, 1857, to determine by vote whether or not the Inferior Court of said county should subscribe for stock in the Georgia and Alabama Railroad, and we have counted, compared and added together the votes polled. Upon a consolidation, we find that there was polled for 'county subscription,' (735) seven hundred and thirty-five votes; and 'against county subscription,' (321) three hundred and twenty-one votes. The whole vote polled was one thousand and fifty-six: 'county subscription,' seven hundred and thirty-five; 'no county subscription,' three hundred and twenty-one; majority for 'county subscription,' four hundred and fourteen.

"Given under our hands and seals, this November 23, 1859.

"CHARLES H. SMITH, J. I. C.,

"L. D. BURWELL, J. I. C.,

"SAMUEL MOBLEY, J. I. C.,

"J. R. TOWERS, J. I. C."

"FLOYD COUNTY—To Southerner and Advertiser office:

"To advertising call by Inferior Court for an election to determine whether county shall indorse bonds of Georgia and Alabama Railroad Company, \$5 00.

"Ordered that the within account be paid out of any money that may be in the treasury.

"J. R. TOWERS, J. I. C.,

"WILLIAM McCULLOUGH, J. I. C.,

"LEWIS D. BURWELL, J. I. C."

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"ROME, GEORGIA.

"At the regular meeting of the Court, it was agreed that Judge T. McGuire has been chosen by the Court to represent the county stock, as a director, in the Rome and Alabama Railroad Company, and we instruct our director to cast the vote of the Court for such men as directors as shall be agreed to by a majority of the Court.

"WILLIAM McCULLOUGH, J. I. C.,

"THOMAS J. DAVIS, J. I. C.,

"W. T. NEWMAN, J. I. C.

"May 13th, 1861."

"TUESDAY, February, 1867.

"Honorable Inferior Court for county purposes met pursuant to adjournment. Present, their Honors C. K. Ayer, J. King, J. E. Veal and D. M. Hood, Justices presiding.

"Ordered by the Court, that D. M. Hood be authorized by the Court to inquire into the indebtedness of the county to the Georgia and Alabama Railroad, whether the Selma, Rome and Dalton Railroad Company assumes the payment of said indebtedness and relieves the county from the payment of the same, and that he associate with him Daniel S. Printup and Charles H. Smith."

"FLOYD COUNTY, to Wright & Broyles, Dr. 1866.

"To investigating and giving opinion at the request of the Justices of the Inferior Court, as to the liabilities of the said county on certain railroad bonds, heretofore issued by said Court on subscriptions made to the Dalton and Alabama Railroad, \$50 00.

"Ordered by the Court that the county treasurer pay Wright & Broyles \$50 00 out of general funds.

"D. M. HOOD, J. I. C.,

"JOHN M. GREGORY, J. I. C.,

"JOSEPH E. VEAL, J. I. C.

"December 2d, 1867."

C. H. SMITH, sworn, said: As one of the Justices of the Inferior Court, I was present at the meeting of Justices on the day the vote was consolidated, and participated in it. There was an agreement among the Justices then present that we would take stock in the Georgia and Alabama Railroad for \$75,000 00, this being an amount intermediate the extremes mentioned in the Act of December, 1857. The Justices were to go in person and each one sign his own name as the representative of the county to the subscription of stock. They did not go at that time, nor did they ever go in a body to subscribe for the stock. The subscription book was at my office, I being the secretary and treasurer of the railroad company. I signed for myself, and I am certain that a majority of the Justices signed also, but I do not remember which of the other Justices signed. Their signatures were all made at different times, and separately. At the time of meeting to consolidate the votes, it was also decided that I should have the bonds prepared, which I did, and then the Justices of the Inferior Court, whose names are to the bonds and conpons, signed them separately, and at different times, when no two of them were present. I was at the same time a subscriber in my own name to the stock of the railroad to the amount of \$3,000 00. Samuel Mobley was a subscriber also to the amount of \$500, and, I think, L. D. Burwell also had subscribed for some stock. The subscription made by the Justices of the Inferior Court was accepted by the board of directors of the Georgia and Alabama Railroad Company in November, 1859. The first call for payment of stock by subscribers was made in November, 1859, for five per cent. of subscriptions. The second call was for ten per cent. in April, 1860. The third call was for ten per cent. in July, 1860, and the fourth and last call was for ten per cent. in October, 1860. About two-thirds of the grading between Rome and the Alabama line was done, and a bridge built across the Etowah river at Rome, when the war began and work was then suspended on the road. Only twenty-five bonds for \$1,000 00 each, with coupons attached were issued; and when issued, which was in

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September and December, 1860, as their dates will show, I delivered them to Colonel Alfred Shorter, who was the president of the railroad. No stock, nor certificate of stock, was ever issued to the county. My term, as Justice of the Inferior Court, continued till the next election, which was, I think, in January, 1861. We had not provided a fund to pay these coupons. After the war, there was an agreement made between the stockholders and directors of three different Railroad companies, to-wit: The Dalton and Jacksonville, the Georgia and Alabama, and the Alabama and Tennessee Rivers Railroad Companies, to consolidate, which consolidation was effected by authority of enabling Acts of the Legislatures of Georgia and Alabama, constituting what is now known as the Selma, Rome and Dalton Railroad Company. The bonds issued and delivered to Shorter were delivered to him in payment of the county subscription.

Respondents objected to that part of C. H. Smith's testimony in which he speaks of the action of the Justices of the Inferior Court, or their agreement to do anything, or their direction about doing anything in reference to the subscription of stock or preparing the bonds.

The Court overruled the objection, and respondents excepted.

Respondents proposed to prove by him that there were at least two thousand voters in Floyd county at the time of the election upon this question of subscription or no subscription, and how many votes were polled.

The Court refused to permit this proof to be made, and respondents excepted.

SAMUEL MOBLEY, sworn, said: I was one of the Justices of the Inferior Court, and was present at the meeting of the Justices to consolidate the vote, and think we agreed to subscribe for stock in the railroad. I did not sign the subscription of stock for the county, but was a stockholder myself in the road to the amount of five shares. The road had been laid out and graded through my land, and damages for the

right of way were assessed in my favor to the amount of \$500 00 against the road, and this amount I agreed to take in stock, but none was ever issued to me. I signed the bonds and coupons which have my name to them, at my house, about three miles from Rome, none of the other Justices being present, and returned them to Mr. C. H. Smith, who had previously signed some or all of them. I returned them to him, as he had given them to me for that purpose. I supposed he knew what to do with them, and that they would be put on the market. They were at my house some four or five days, during which time I signed them.

The same objection was made to Mr. Mobley's testimony that was made to Mr. Smith's, and overruled by the Court, and respondents excepted.

ALFRED SHORTER, sworn, said: A few days after these bonds were issued and delivered to me, as president of the Georgia and Alabama Railroad Company, in payment of the county subscription, I advanced the amount of five of them to the road and took the bonds myself; others were delivered to Mr. Gray, the contractor, in payment for work upon the road, and he sold one of them to Mrs. Cooley, who was then living, but now dead, and upon whose estate I am the executor; the other nine, which he received, he sold to the Bank of the Empire State, of which I was president; these, among the other assets of the bank, were turned over to H. D. Cothran, as assignee of the bank after the war, and were by him sold at public outcry, at the Court-house in Rome, about the year 186..., and I bought them at \$300 00 or \$400 00 each, intending to use them in payment of the liabilities of the bank, which had failed—or, at least, I intended to let the bank have the use of them in settling its liabilities. Besides being president of the bank, I was also a stockholder, and so was Colonel Cothran. At the time I received the bonds, I knew of no informality in the action of the Court in reference to their issue; made no inquiry upon the subject. Knew of

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no money belonging to the county in the Bank of the Republic.

(Here a paper was shown to Mr. Shorter, of which he stated he had served a copy upon Jesse Lamberth, the Ordinary of Floyd county.)

It was introduced, and is a paper presented to the Ordinary on May 31, 1869, containing a statement of the bonds and coupons held by the petitioner, and a demand that the Ordinary levy a tax and pay the coupons then due, and to fall due July 1, 1869.

A paper was next offered in evidence, and objected to by counsel for respondents, but admitted by the Court, a copy of which is as follows :

“Ordered by the Court, that D. M. Hood, Wade S. Cothran and Daniel S. Printup are authorized to represent the county of Floyd in the convention of the Selma, Rome and Dalton Railroad Company, to assemble in Selma on the 15th of May, 1867. Either of said persons mentioned can use this authority, or conjointly.

“D. M. HOOD, J. I. C.,

“J. KING, J. I. C.,

“J. E. VEAL, J. I. C.

“May 10th, 1867.”

“GEORGIA—FLOYD COUNTY :

“I, James W. Langston, Clerk of the Inferior Court of Floyd county, do hereby certify that the above and foregoing is a true extract from the minutes of said Court.

“Given under my hand and seal of said Court, this the 14th day of May, 1867.

[L.S.]

“JAMES W. LANGSTON, Clerk.”

To the admission of this document the respondents excepted.

D. M. HOOD, sworn, said : The resolution or order just introduced in evidence was adopted by the Inferior Court at the time it bears date, upon the idea that the Inferior Court of

the county had really subscribed for stock in the Georgia and Alabama Railroad Company, in conformity to the law, and that the county was really a stockholder in the road; never knew of these difficulties about the manner of subscription until after that order or resolution was adopted. During my term of office (which was about three years,) as a Justice of the Inferior Court, we had no funds in any bank to pay these coupons.

SAMUEL MOBLEY, re-introduced, said: While I was in office as Justice of the Inferior Court, we had provided no funds in any bank to pay these coupons.

D. S. PRINTUP, sworn, said: I was present at a convention of the railroad stockholders in 1866, at the time it was agreed to consolidate the three railroad companies, and was afterwards elected vice-president of the Selma, Rome and Dalton Railroad Company. As such vice-president, I offered to turn over to Jesse Lamberth a certificate of stock in the Selma, Rome and Dalton Railroad, issued in favor of the county for the stock subscribed in the Georgia and Alabama Railroad. Mr. Lamberth refused to accept it. This was before this action was begun, and was in 1869 or 1870. Dr. J. M. Gregory was present at that convention and took part in the meeting—and he was then one of the Justices of the Inferior Court of Floyd county, and claimed to be representing the county.

JESSE LAMBERTH, sworn, said: I was Ordinary of Floyd county from 1852 till the election and qualification of my successor, H. J. Johnson, in 1869. I acted as his clerk during that year, and did most of the business of the office. The certificate of stock as testified to by Col. Printup, was offered to me and refused. During my term of office I had provided no funds with which to pay these coupons.

Relator closed. Respondent introduced no testimony.

The charge of the Court to the jury was substantially as follows:

The Court read to the jury the Act of December, 1857, authorizing the issue of bonds, etc., by the county of Floyd, and charged, that if the bonds were issued without authority, then they and the coupons are void, even in the hands of a *bona fide* holder, and the plaintiff cannot recover.

1st. But if you find from the evidence that the Inferior Court did order an election, and give notice as required by the statute, and a majority of the votes polled at that election were for county subscription, and if the result of that election was placed upon the minutes of the Inferior Court as required by the Act, then, in the opinion of the Court, the statute under which the election was held, and the vote of the legal voters of the county, constituted a legal authority for the subscription of stock, and also for the issuing of bonds by the Inferior Court. If you find from the evidence that these facts existed, which the Court has charged you constituted the authority for the subscription to be made and the bonds to be issued; and if you further find from the evidence that the Justices of the Inferior Court, or a majority of them, actually agreed among themselves when together, to make the subscription and issue the bonds, and that they actually made the subscription for the stock and signed the bonds and delivered them in payment thereof, then the fact that the Justices may have signed the subscription, and may have signed the bonds while they were not in the presence of each other, cannot vitiate the bonds in the hands of a *bona fide* holder, without notice of those facts.

The Court here explained what constitutes a *bona fide* holder without notice, and proceeded as follows:

2d. These bonds are negotiable, commercial securities, issued by a corporation, and like ordinary promissory notes in this respect. And if it appears from the bonds that they were issued under the Act of December, 1857, which is the charter of the corporation; and if it appears from the evidence that the plaintiff purchased them *bona fide*, and without notice of any irregularity in their issue, and for a valuable consideration, paid by them to the railroad company, then

the bonds are valid in his hands and binding on the county, though there may have been irregularities in their issue, and though no resolution was entered on the minutes of the Inferior Court directing the subscription to be made or the bonds to be issued, and though the bonds were not signed when the Court was in session, or at their usual place of meeting; *provided*, the subscription for stock and the bonds were actually signed by three or more of said Justices, and the bonds delivered, as I have before explained.

3d. If the plaintiff was such a *bona fide* purchaser of the bonds before they fell due, his rights would not be affected by *fraud*, provided he took the bonds without any notice of the facts constituting the fraud. But it is not necessary that I charge as to fraud, as the question is not made in the pleadings in this case.

4th. The Inferior Court was the sole judge of the question whether a majority of the legal voters of the county had voted in favor of subscription; and if they have determined that question in the affirmative, it cannot be a question on this trial. Whether there were more voters in the county than voted is immaterial, as a majority of those voting decided the question.

5th. The jury have the right to take into their consideration the recitals in the bonds, in connection with all the other testimony in making up their finding.

6th. If the bonds were executed at the time they bear date, then, in the opinion of the Court, the plaintiff would not be barred by the statute of limitations.

The jury returned a verdict in favor of the relator.

The respondents assign error upon each of the aforesaid grounds of exception, and upon each portion of the charge of the Court numbered, respectively, 1, 2, 3, 4, 5, 6.

WRIGHT & FEATHERSTON; ALEXANDER & WRIGHT, for plaintiffs in error.

1st. Exercise of power by corporate or *quasi* corporate bodies must be at a corporate meeting: Dillon on Mun. Cor.,

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secs. 197, 208; 19 N. J. Eq., 412; 25 Md., 18; see 3 Ga., 331. Power conferred on a council can be exercised only by ordinance: 18 Md., 284, 300; *Ibid.*, 276; 16 Cal., 225; 20 Cal., 96; Cooley's Cons. Lim., sec. 204. Contracts made by majority of board of aldermen, void: 7 Gray, 12; 13 Gray, 347; 6 Cal., 531; see 20 Ga., 363.

2d. Requisites of a valid session of the corporate body: Dillon on Mun. Corp., secs. 200, 202, 223, 224; 22 N. Y., 128; 2 Gill., 254; 7 Conn., 214; 2 House of Lords' Cases, 789.

3d. No valid action of the individuals shown: 2 Pick., 345; 1 Bos. & Pul., 229; 2 *Ibid.*, 31; 6 Johns., 39; 6 S. & R., 166; Story on Agency, sec. 42; 7 Cow., 526; 21 Wend., 178; 31 Miss., 525; 26 Conn., 192; 22 Barb., 400; *Ibid.*, 137; 5 Bin., 481.

4th. What constitutes ratification by corporate bodies: 10 Wal., 676; 5 Cal., 531.

5th. There can be no innocent purchasers of void bonds: 7 Wal., 666; 10 Wal., 676.

UNDERWOOD & ROWELL; SMITH & BRANHAM, for defendant.

1st. There was no fraud in the issue or the purchase of the bonds. Fraud is not a question in the case. The bonds are negotiable securities. Bonds, payable to bearer, or indorsed in blank when payable to order, pass by delivery. Form of the bond show this: 20 Howard, 343, 364.

2d. Mobley says they were delivered to be put on the market. Shorter and Cooley are *bona fide* holders for value: 2 Ga., 92, (6,) 103, (6.)

3d. The bonds were issued to Shorter, president, for negotiation. His indorsement passed the title, (1 Kelly, 418;) but the title is not questioned: Statute of Limitation, 43 Ga., 258; Commissioners Limestone Company vs. Rather *et al.*, at the last term of the Supreme Court of Alabama; 9 Wal., 478; 3 *Ibid.*, 327; Irwin's Code, 2865. Act of 1869 not barred if sued by January, 1870: 14 Wal., 282, (5.)

4th. Case in 46 Georgia, 462, refers only to contracts made since the adoption of the Code. All that was required to be entered on the minutes by the Act was so entered, to-wit: the election. The books of the railroad company were the proper place to make the subscription. The duties of the Court were ministerial, not judicial: 9 Ga., 485; 1 Kelly, 579; 6 Ga., 145, (3,) and 157, (5); 19 *Ibid.*, 487; 20 *Ibid.*, 334; 3 Wal., 96; 1 Sneed, 680; Angell & Ames on Corporations, 291.

5th. The contract was the act of the county and bound the county; (2 Kelly, 216;) initials "J. I. C." All judicial acts subject to review by appeal or *certiorari*; ministerial are not. Courts can only be held at stated times. *Mandamus* the remedy: 5 Ga., 522; 18 *Ibid.*, 473.

6th. If the Inferior Court had the power, under the statute, to act, then the bonds are valid, especially in the hands of *bona fide* holders, though there were irregularities in their issue: 21 Howard, 539; 24 *Ibid.*, 288, 375; 1 Wal., 83 to 93, 175, 385; 9 *Ibid.*, 414; 13 *Ibid.*, 305; 14 *Ibid.*, 282; 15 *Ibid.*, 355; 5 *Ibid.*, 784; 11 *Ibid.*, 476; 1 Sneed, 637; Irwin's Code, 2743; 43 Conn. Reps., 400; 8 Volume American Law Register, 274; 33 Mississippi, 440.

7th. On power of a majority to act: 9 Pick., 146; 35 New Hampshire, 477; 26 Connecticut, 192; 21 Wend., 187; 9 Ga., 367; 1 Kelly, 271; Code, of 1873, section 4.

8th. On ratification: 6 Ga., 171; 10 *Ibid.*, 362; 20 Cal.; Code, section 2142.

9th. On proof of agreement by Justices to subscribe and issue bonds: 1 Greenleaf on Evidence, 513; 3 B. & C., 449, 451; 20 Ga., 334, compare with 364; 13 *Ibid.*, 485.

McCAY, Judge.

1. Whilst we sympathize deeply with the citizens of a community who, misled by high hopes of profit from a scheme of internal improvement, have borrowed money to inaugurate it, and after the scheme has failed, are pressed to pay the debt they have contracted, we still feel that the men who have honestly bought their bonds have, themselves, equities of a

high character. The *authority* to make the subscription and issue the bonds was complete when the vote was consolidated and entered on the minutes. All that the Act required to be done was then done. Indeed, by its terms, no discretion was left to the Inferior Court. If the people should vote for subscription, the Court is directed to subscribe. It needed no resolution or order of the Court to determine whether there should be a subscription. So that it can, we think, be said, without qualification, that the "Inferior Court" had the power and legal authority to issue the bonds authorized by the Act as soon as the people had voted in favor of subscription and their action been spread upon the minutes.

2. An examination of the innumerable Acts passed by the Legislature during the existence of the "Inferior Court," will show that it was designated sometimes as the Inferior Court, and sometimes as the "Justices of the Inferior Court." When any legislation was had in relation to its powers as a Court of law, it is true, it was uniformly designated as "the Inferior Court;" but in legislation in reference to its power over roads, bridges, taxes, and the general management of county affairs, both designations are given it. Often, in the very same Act, powers are conferred and duties cast, in one sentence, on "the Inferior Court," and in another on "the Justices of the Inferior Court;" and this, too, in relation to matters which, in the nature of them, could not be attended to at the regular sessions held twice a year for the exercise of its constitutional jurisdiction as a Court of law.

The Code adopted by the Legislature in 1860, in stating the duties of the "Inferior Court," after pointing out its duties as a Court of law, goes on, in the same section, to add its duties over the county property, its duty to lay taxes, establish bridges and roads, ordering elections to fill vacancies, settling claims against the county, providing for the support of the poor, etc., all of which are duties which it has been the universal custom and practice for the Inferior Court to perform when it was not sitting at its semi-annual sessions as a Court of law. It is very evident, too, from an inspection of

the Act under which these bonds issued, that the words "Inferior Court," used by the Legislature, in this Act, must mean the Inferior Court at its called meetings for the transaction of its ordinary county business. The duty cast upon the Court is just such duty as it performs at such meetings. The Act itself uses both the modes of designating the Court. After providing that the Inferior Court shall represent the county, it provides that the Justices of the Inferior Court shall consolidate the returns and enter the result on the minutes of Court. Here the Justices are directed to have this result entered on the minutes of Court. What Court? Evidently, the minutes kept of the transactions of the Justices of the Inferior Court, whether at their semi-annual meetings as a law Court, or at their called meetings for the transaction of county business of any kind; for it must be remembered that the same book of minutes has always been used to record the action of the "Inferior Court" sitting as a Court of law, and the Inferior Court sitting for county purposes. For these reasons, we are of the opinion that the "Inferior Court," as used in this Act, does not mean "the Inferior Court" sitting as a Court of law, at its semi-annual sessions, but the Inferior Court in its every-day, ordinary sense, to-wit: that body which governed the county, laid out its roads, assessed its taxes, etc., and which met, at its pleasure, for the transaction of any business it had to do. If it be true, then, that the Inferior Court had power to issue these bonds, and it be further true that the "Inferior Court" did issue them, it would seem, from the current of authorities, that, as against a *bona fide* holder, it is immaterial whether there were, or were not, irregularities in the issue.

One can hardly conceive but that it was the clear intent of the Legislature that the bonds it intended to authorize were to be signed by the Justices of the Inferior Court, or a majority of them. That has always been the mode in which the Inferior Court has contracted, in this State, as any one familiar with its history knows. When, therefore, bonds which the Court was authorized by law to issue, were, in fact, put in cir-

culatation, executed as such contracts usually were, and made upon their face negotiable, a *bona fide* holder of them is not chargeable with concealed defects or irregularities. Whether the signatures of the members of the Court were all attached at the same time or not, could not appear upon the face of any bond, and one who took it without notice of such defect would be free from such a defense. In this State, bonds payable to order or bearer, have stood upon the footing of commercial paper since our Judiciary Act of 1799: See Prince Digest, 426. But even in the other States papers of this character are *now*, by universal consent, put upon this footing, and the *bona fide* holder stands like the *bona fide* holder of a promissory note. If the paper is right upon its face, a purchaser cannot be charged with irregularities, in the issue of which he has no notice: Com. of Knox county vs. Aspinwall, 21 Howard, 539; Curtis vs. County of Butler, 24 Howard, 436; Woods vs. Lawrence, 1 Black, 386; Moran vs. Commissioners, 2 Black, 732; 1 Wallace, 291; *Ibid.*, 385; 3 Wallace, 96; 9 *Ibid.*, 414; 13 *Ibid.*, 305; 14 *Ibid.*, 282.

3. We recognize the propriety of publicity in acts by public officers of this character, and without question it would have been more formal and regular for the Court to have passed an order and put it on the minutes, declaring the amount of the subscription, the date, numbers and denomination of the bonds, etc. But this order was not any part of the power of the Court to issue the bonds. The power and authority came from the Legislature and the people. The order would have been only a more complete and regular mode of doing it. In the case of *House vs. The Justice*, 20 Georgia, 328, this Court held, in effect, that the Inferior Court might make a parol contract, and that it is not a *necessity* that its action in such a matter should appear on the minutes. In other words, the contract of the county, if signed by the Justices, was not invalid because not mentioned on the minutes. The determination of the Court as to the amount they would subscribe, and the character of the bonds, was made, as Mr. Smith testifies, when they were all together. The mere man-

Central Line of Boats *vs.* Lowe.

ual act of signature might well be done separately, and perhaps at last the delivery of the bonds, in answer to the call of the company, was the real issue, and it does not appear when or how that was done. But, as we have said, these bonds are commercial paper. Our Act of 1799 makes them so in terms, and the Courts now almost universally so consider them. And if so, the purchaser of them has only to inquire into the authority of the Inferior Court of Floyd county to issue bonds. If they had the authority and the bonds with their official signatures to them were issued by them, the holder of the bonds is not bound to inquire further.

4. That the bonds passed by Shorter's indorsement is well settled: See 1 *Kelly*, 418; 16 *Georgia*, 458.

Judgment affirmed.

CENTRAL LINE OF BOATS, plaintiff in error, *vs.* CHARLES M. LOWE, defendant in error.

When a common carrier, by steamboat, undertook to carry cotton under a special contract, in which it was stipulated that he was not to be liable for unavoidable accidents, and one of the bags of cotton was lost by falling into the river, in consequence of the breaking of "the hog chain," or rod, against which the cotton was piled on the deck of the boat; and on a suit brought for the loss, the defendant proved that the rod had been lately examined, and that it appeared sound; that it had previously borne heavier weights, and that it broke in consequence of a hidden flaw:

Held, That it was not error in the Court to charge the jury, that if the cotton was lost under these circumstances, the defendant was liable.

Common carriers. Negligence. Before Judge JOHNSON. Muscogee Superior Court. October Term, 1872.

Charles M. Lowe brought an action against the Central Line of Boats to recover the value of one bale of cotton. The declaration alleged that the defendant was the owner of a steamboat on the Chattahoochee river at Florence, and bound for Columbus; that plaintiff shipped three bales of cotton by

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Central Line of Boats vs. Lowe.

said steamboat, to be safely and securely delivered, in good order, at Columbus, the dangers of river navigation, fire and unavoidable accidents excepted; that, although the defendant was not prevented by dangers of river navigation, fire or unavoidable accident, yet they failed to deliver the same.

An amendment was made at the trial, adding an ordinary count against a carrier, and omitting the exceptions; also, an amendment in trover.

The defendant pleaded the general issue, and that it was prevented by unavoidable accident from delivering the cotton. The case was submitted to the jury upon these issues.

Plaintiff introduced the bill of lading given for the cotton, which contained the exceptions set forth in first count in declaration, and proved failure to deliver.

Defendant showed that the loss was occasioned by the breaking of the hog chain, which is an iron rod used to support the guards of the boat; that this hog chain was not broken by the weight of the cotton, but on account of a secret flaw in the iron; that this flaw was not known to the officers of the boat until after it had broken; that the hog chain had been examined half an hour before the accident, and it was then apparently as sound as it ever was; that much greater loads had been carried on the guards.

The captain of the boat certified that the cotton was not lost by negligence, but by an unforeseen accident.

The Court charged the jury as follows: "That if, by the breaking of the hog chain, the cotton was thrown overboard and thereby lost, the defendant was liable to the plaintiff for it, though the flaw in the chain may have been concealed and undiscovered by the defendant, as disclosed by the testimony."

Under this charge, the jury found for the plaintiff.

The defendant excepts to this charge, and assigns the same as error.

PEABODY & BRANNON, for plaintiff in error.

MOSES & DOWNING, for defendant.

McCAY, Judge.

There is, doubtless, a distinction between an "act of God" and an "unavoidable accident." The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man: 2 *Kelly*, 349; *Campbell vs. Morse*, Harper's Reports, 468; 2 *Dana.*, 430; 4 *Stew. & Port.*, 382; and, doubtless, it was the intent of the parties here to go further than to protect the carrier against the "act of God," since he was not liable for that in any event. But to make out the case of an exemption for a carrier, against either the "act of God," or "unavoidable accident," there must be a *vis major*—the interfering cause must be irresistible. The very words "unavoidable accident" imply this. If by any care, prudence or foresight, the thing could have been guarded against, then it is not "unavoidable."

It seems absurd to say that it was not possible to have avoided the breaking of this chain or rod. It ought to have been *made* stronger—it ought to have been tested. The case is one of a simple failure to have a good vessel. This was, doubtless, an accident, and were that the only word used in the agreement, the carrier would be excused; but the words are far stronger than this. As we understand the words, they mean an irresistible cause, standing exactly on the footing of an act of God, except that it is the product of human agency.

We are clear this is not such an accident as was "unavoidable." It was negligence in the carrier to have so frail a "guard" in so important a place. He might just as well claim that any other simple accident was "unavoidable."

Judgment affirmed.

CASES
ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA,

JANUARY TERM, 1874.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.

H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

JOSHUA EARP, plaintiff in error, *vs.* THE STATE OF GEOR-
GIA, defendant in error.

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GEORGE EARP, plaintiff in error, *vs.* THE STATE OF GEOR-
GIA, defendant in error.

There being no evidence to support the verdict, a new trial will be ordered.

New trial. Before Judge McCUTCHEN. Bartow Superior Court. September Term, 1873.

As these cases turn entirely on the evidence, no principle of law being involved, any further report than that contained in the decision would be useless.

WARREN AKIN; A. P. WOFFORD, for plaintiffs in error.

A. T. HACKETT, Solicitor General, by PEEPLES & HOWELL, for the State.

WARNER, Chief Justice.

The defendants, Joshua Earp and George Earp, were jointly indicted for the offense of burglary in the day-time. They were tried separately and both found guilty by the jury. A motion was made for a new trial in both cases, which was overruled by the Court, and the defendants excepted. Both cases were argued together here. In looking through the record in each case, we are clearly of the opinion there is no evidence which would have authorized the jury, under the law, to find the defendants guilty of the offense with which they were charged. They may have been guilty, but they were not *proved* to have been so, and therefore the verdict in both cases was contrary to law. The law does not allow any one to be convicted of any offense merely on a *suspicion* of their guilt. It would be a just reproach to the judicial tribunals of the State, and to the administration of the laws thereof, to allow a conviction to stand on the evidence contained in the record before us.

Let the judgment of the Court below be reversed in both cases.

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BRYANT BLIZZARD, plaintiff in error, vs. MARY E. NOSWORTHY *et al.*, defendants in error.

1. A refusal of an injunction does not bar the complainant from making a second application, when he presents new and additional matter discovered since the former hearing.
2. Though a deed be produced under notice, and inspected by the opposite party, he is not thereby deprived of any right to impeach the deed for fraud or other causes that may avoid it.
3. There was no abuse of discretion by the Chancellor in hearing the second application, and in granting the injunction, provided the same be construed as restraining the trial of the ejectment case until a final hearing of the bill, with the right of the parties to a trial of both cases together.

Injunction. Deeds. Ejectment. Production of papers.
Before Judge BARTLETT. Baldwin county. At Chambers.
February 26, 1874.

Mary E. Nosworthy and her husband, Daniel Nosworthy, filed their bill against Bryant Blizzard and Eliza F. Moran, making, substantially, the following case:

In the year 1853, William A. Moran died intestate, leaving a tract of land, unnecessary to be described, as a part of his estate. His heirs were his widow, the defendant, Eliza F. Moran, and two children, to-wit: James H. Moran and Mary E. Moran, now the complainant, Mary E. Nosworthy. The defendant, Eliza F. Moran, administered upon his estate. Though the estate was free from debt, and though no guardian had been appointed for said minor heirs, yet the said administratrix did, on the first Monday in March, 1860, procure an order from the Ordinary of the county of Baldwin, to sell all the lands of said intestate, and did advertise the same to be sold on the first Tuesday in May. No sale was made on that day, but, on the 10th of July following, said administratrix entered into this contract with the defendant, Blizzard:

“MILLEDGEVILLE, GEORGIA, 10th July, 1860.

“This is to show that Mrs. Eliza Moran and Bryant Blizzard have this day bargained, to-wit: Mrs. Moran, as administratrix, and by consent of the Ordinary, agrees to give the tract of land belonging to the estate of William Moran, and upon which Blizzard is now residing, and \$150 00 besides, payable the 25th of December next, for a negro woman, Corinna, and her male child, about four years old, the title and health of said negroes he, Blizzard, warrants, and Mrs. Moran warrants and defends the title to the land, said land containing two hundred and eighty-five acres, more or less.

(Signed)

“A. H. KENAN,

“Attorney for Elizabeth Moran.

“B. BLIZZARD.”

Said widow had never made any election of a child's part of said estate in lieu of dower, whereby her right to inherit any part thereof was barred.

Complainants charge that it was beyond the power of said administratrix to purchase slaves for said estate, or to pay her

Blizzard vs. Nosworthy et al.

debts with the lands thereof. On April 25th, 1861, said administratrix did privately execute a deed conveying said lands to said Blizzard, reciting therein no public sale of the same, but acknowledging the receipt of \$1,550 00 as a consideration therefor. Complainants deny that any consideration was paid, except the slaves aforesaid.

On January 19th, 1872, complainants and James H. Moran instituted an action of ejectment against said Blizzard for said land. On December 25th, 1872, said James H. died intestate, leaving his mother, Eliza F. Moran, and his sister, the complainant, Mary E. Nosworthy, his only heirs-at-law. The action then proceeded in the name of complainants for three-fourths of said property. At the August adjourned term, 1873, of the Superior Court of Baldwin county, said case came on for trial. The deed of April 25th, 1861, heretofore referred to, was produced by the defendant under notice from the plaintiffs, who believed it to be forged. It was inspected by the plaintiffs, and thereby became admissible in evidence, notwithstanding no public sale was shown, under the stern rule of law laid down in 18 *Georgia Reports*, 609. It was read to the jury. A verdict was rendered for the defendant, which, on motion, was set aside. Complainants only became acquainted with the facts as to said contract of July 10th, 1860, and as to the consideration of said deed, since the aforesaid trial.

Pray that the defendant, Blizzard, may be decreed to deliver up the aforesaid deed, to be canceled as to three-fourths of said land, or that said deed be reformed so as to convey only said one-fourth interest to said defendant; that an equitable partition may be made of said land; that said defendant, in the meantime, be enjoined from introducing said deed in evidence in the aforesaid case, or from setting up any rights thereunder.

Blizzard answered, substantially, as follows:

1st. Denies positively all charges of fraud.

2d. Denies that defendant, Blizzard, and Eliza Moran, administratrix, ever exchanged land for slaves.

3d. Denies positively, that said paper of July 10, 1860, was the beginning of the trade, or was the trade between him and the administratrix for said land; but alleges that it was the end of the matter, and that it was, in truth, not a bargain for the land and slaves, privately, but a full receipt of payment of the price of said land—\$1,400 00, as bid off at previous public sale, of May, 1860, for which price—\$1,400 00 in money, on seven years' credit, with interest, running and payable yearly—defendant had given his promissory note, with privilege to pay sooner, and get title for the land at payment, and that two months after the public sale of the land, on May sale-day, 1860, to-wit: on July 10, 1860, a new transaction sprang up between the parties, whereby defendant, Blizzard, then, for the first time, sold two slaves to said Eliza Moran, administratrix, for a larger price than the land had brought at May sale, and said administratrix paid him for his two slaves, not in land, but in his own promissory note for \$1,400 00, and interest accrued, and for the excess of price of the slaves over the said land-note, she, said Eliza, then gave defendant her own promissory note. Exhibits, in support thereof, viz:

1st. Sworn copy, from Gazette, of notice of intention of administratrix to apply for leave to sell.

2d. Certified copy of record of Ordinary, of March term, 1860, granting administratrix leave to sell said land.

3d. Sworn copy, from Gazette, of forty-days' notice of sale, for May sale-day, 1860.

4th. The two supporting affidavits of Standley and Simpson, deposing that they were present at the sale, and that it was a public sale, for \$1,400 00, to Blizzard, on first Tuesday, etc.

5th. Certified record of Ordinary, showing the return of sale of the land by said administratrix to the Ordinary, August 6, 1860, and its approval, and order to record on September 3, 1860.

The case, thus presented, was heard on January 20th, 1874, and the injunction refused on the 30th of the same month.

Blizzard vs. Nosworthy et al.

The complainants then filed an amended bill by which they set up newly discovered facts, as follows:

They admit that there was a public sale of the property in dispute in May, 1860, and that it was bid off to the defendant, Blizzard, who was not present in person, but aver that said public sale was not *bona fide*; that it was a single bid, and nominal, and not for money, and only made to "perfect titles" to Blizzard, and so announced by the crier; that the defendant, Blizzard, and administratrix, Eliza Moran, had previously and illegally bargained with each other privately, through her attorney, Kenan, for an exchange of said land for Blizzard's two slaves, and exhibited, in that connection, a bill of sale, dated July 5, 1860, for said two slaves, at \$1,552 00, made by Blizzard to the administratrix; and attached two affidavits from the same eye-witnesses of the public May sale, 1860—Standley and Simpson—deposing that it was announced that said public sale was to perfect titles, etc.

Blizzard again answered as follows:

1st. Denies that the amended bill shows any newly discovered facts material or sufficient to justify an injunction or interference by equity to stop him from reading to the jury his said title deed.

2d. Reaffirms his answer to the original bill.

3d. Denies all charges of fraud.

4th. Denies that the admitted public sale of May, 1860, was only nominal, or not *bona fide*, and only to perfect title; disclaims having any private title "to perfect;" claims under said "public sale" in good faith, and avers it was fairly and legally made by order of the Ordinary, granting leave to sell, and denies that he ever rented the land for 1859, or for any other time.

5th. Denies that there ever was any sale, or offer to sell, or wish to sell his two slaves prior to the public sale of said land; and avers that he purchased said land *bona fide*, at public sale of May, 1860, and never sold, or offered to sell, his slaves until two months thereafter—July 4th, 1860—and then sud-

denly sold them for \$1,600 00, paid in his own note of \$1,400 00, with interest, and in administratrix's note of \$150.

6th. States that the administratrix and her family had for several years abandoned the land, which is a rude little farm, consisting of a log cabin and thirty-acre field; alleges that the administratrix was openly in the market, soliciting bidders; that he was willing to bid \$1,400 00, and no more; and to catch his bid certain, and more if possible, administratrix got leave of Ordinary to sell said land, and did sell it publicly, May sale day, 1860, and *bona fide*; and defendant would have missed the land if anybody had overbid his \$1,400 00, for that was his highest figure, and a higher bidder would have got it on same terms of credit. Denies that she was bound to accept his intended bid of \$1,400 00; his willingness to bid so much was made known to administratrix by him, and it was so high a bid, so much above all probable competition, and so satisfactory to administratrix, that it was agreed verbally between them in October, perhaps September, 1859, after fodder-pulling, and in the midst of cotton-picking time, that while she, administratrix, was getting ready for public sale of said land, defendant might enter thereon at end of year 1859, in advance of the public sale, which he did on 28th day of December, 1859; and afterwards, at May sale, 1860, he got the land at his bid of \$1,400 00; but he disclaims ever having any title thereto by previous private agreement, and denies that administratrix was bound to accept his bid of \$1,400 00, if she could get a better. Claims that if said agreement of October or September, 1859, be held to be a private sale of said land, then it is valid, by express statute, as it was prior to December 17th, 1859, but denies that he ever purchased said land privately.

7th. Five supporting affidavits annexed to this answer.

The defendant, Eliza F. Moran, answered, sustaining substantially all the allegations of the bill.

On February 26th, 1874, the Chancellor passed the following order:

"This cause having been heard on amended bill and an-

Blizzard vs. Nosworthy *et al.*

swer, after argument of counsel, it is ordered that the injunction prayed for be granted, and that defendant, Bryant Blizzard, be enjoined, in the penalty of \$2,000 00, as prayed for in complainants' bill, from using as evidence the deed of April 25th, 1861, until final decree at the trial of said cause."

To this order the defendant, Blizzard, excepted.

WILLIAM MCKINLEY, by Z. D. HARRISON, for plaintiff in error.

CRAWFORD & WILLIAMSON, for defendants.

TRIPPE, Judge.

1. There is no good legal reason why a complainant may not, after a refusal of an injunction by the Chancellor, make a second application, especially when he presents new and additional matter discovered since the former hearing. By analogy to the rule for granting new trials for newly discovered testimony, it would be but reasonable that a Chancellor could thus rehear a second application for injunction. A second injunction may be granted in the discretion of the Judge: New Code, 3223.

2. We presume, from the argument of counsel in this case, that complainant feared that unless an injunction could be obtained and a decree had, no attack could be made on the deed of the administratrix to Blizzard, from the fact that it had been produced on a former trial of the ejectment cause, inspected by the plaintiff, and used in evidence at that trial. This apprehension arises from a mistaken construction of the decision in *Wooten vs. Nall*, 18 *Georgia*, 609. The rule there stated is, that if a party calls for papers from the other side, and they are produced and inspected, they are then admissible as evidence for both parties, and on all subsequent trials. But neither that decision or any of the authorities cited, declare such papers conclusive evidence of the truth of what they contain, nor that the fact of their production and inspection precludes inquiry as to their validity. A notice

to produce a deed is often given for the purpose of proving it a forgery. All papers so produced and inspected by the party calling for them, are admissible in evidence without further proof as to execution, and for what they may be worth to the party introducing them, without any disability incurred by the one giving the notice, so as to prevent him from attacking them for fraud, or other cause, that may avoid them. They may thus become evidence, but not unimpeachable, conclusive evidence.

3. We do not think there was any abuse of discretion by the Judge in hearing the second application and granting the injunction, provided it be construed as restraining the trial of the ejectment cause, until a final hearing of the bill, with the right to the parties to a trial of both cases together. It would be highly unjust to the defendant in ejectment to deny him, by injunction, the right to use his deed, his only defense, perhaps, and still force him to trial. The difficulty seems to grow out of the form of the prayer, to-wit: it does not ask that the proceedings at law shall be stayed, but only that the defendant shall not use his deed on the trial thereof; and the order of the Chancellor is a grant of the prayer for injunction. We have no idea that the Judge intended that the action at law should be allowed to be forced to trial by complainant with the hands of defendant tied, so that his chief muniment of title could not be used by him. It was stated by counsel, in the argument, that a continuance of the ejectment case had been allowed, on account of the injunction. But as there seemed to be some apprehension on this point, and as the question was distinctly made, we have given the case such direction that no harm of that sort can result from the injunction.

Judgment affirmed.

Clews & Company vs. The Brunswick and Albany R. R. Co. *et al.*

HENRY CLEWS & COMPANY, plaintiffs in error, vs. THE
BRUNSWICK AND ALBANY RAILROAD COMPANY *et al.*,
defendants in error.

Where a creditor's bill was filed against a railroad company and a decree had, adjudicating the dignity and priority of the various claims before the Court, and directing the sale of the road, a creditor, who was a party to such decree, cannot subsequently, but before the distribution of the proceeds of such sale, by an amendment to the original bill, set up a preferred claim, held by him as collateral security for the indebtedness passed upon by such decree.

Equity. Debtor and creditor. Amendment. Before Judge
SCHLEY. Glynn Superior Court. November Term, 1873.

For the facts of this case, see the decision.

DANIEL S. PRINTUP ; A. J. SMITH, for plaintiffs in error.

O. A. LOCHRANE ; A. O. BACON ; THOMAS J. SIMMONS ;
J. C. NICHOLS, for defendants.

WARNER, Chief Justice.

A creditor's bill was filed against the Brunswick and Albany Railroad Company, and a final decree was had in the cause adjudicating the rights of the respective parties before the Court, the dignity and priority of their claims as creditors of the company, which directed the road of the company to be sold, and which was sold under said decree. Henry Clews & Company were parties to that bill, presented their claim against the company, which was adjudicated by that decree, and a general judgment rendered in their favor.

After the sale of the road, but before the distribution of the money arising from the sale thereof, Clews & Company petitioned the Court to amend the original bill under which the road was sold, so as to allow them to set up, as a preferred claim, certain coupons which they alleged were due them for interest on certain described first mortgage bonds on the road, which they held as collateral security for the payment of the claim for which they had obtained the aforesaid general judgment.

The Court refused the application to amend the original bill after the decree in the cause had been rendered, as before stated, and the petitioners excepted.

The effect of allowing the amendment to the original bill would have been to have opened and set aside the decree of the Court—at least, so far as the petitioners' claim was concerned, which had been adjudicated by that decree. They were parties to the original bill, and if they had the claim which they now seek to set up when that original bill was pending, it was their duty to have set it up then, and to have had the judgment of the Court upon it. They state no good reason why they did not do so. They do not allege that they were prevented from setting up their claim for the interest due on the bond coupons by fraud, accident or mistake, or by the act of the adverse party, unmixed with negligence on their part. They had their day in Court as to all the claims they held against the company, which they thought proper to present for the consideration of the Court when the decree was rendered. They do not occupy the position of creditors who were not parties to a creditor's bill, and had no notice of the proceedings, or opportunity to have been heard in relation to their claims against the company. There was no error in the Court below in refusing to allow the amendment to the original bill, on the statement of facts disclosed by the record.

Let the judgment of the Court below be affirmed.

ADONIRAM J. WILLIAMS, administrator, plaintiff in error, *vs.*
LEWIS N. WHITTLE, executor, defendant in error.

The rule that a lapsed or void legacy of personal property falls into the residuum and passes to the residuary legatee, does not apply to a void devise of land, and in such a case the land descends to the heir.

Administrators and executors. Wills. Legacies. Before Judge BUCHANAN. Monroe Superior Court. August Term, 1873.

Williams vs. Whittle.

Whittle, as executor of Margaret Cotton, filed his bill against Williams, as administrator, *de bonis non cum testamento annexo*, of John Cotton, making the following case :

On July 2d, 1870, John Cotton executed his will, by the first item of which he gave to his wife, Margaret Cotton, all his property, real and personal, with certain exceptions mentioned in other items, during her natural life. By the third item he bequeathed to Peter Jones, in trust for certain slaves, two lots of land. The devise in this item has been held void by the Superior and Supreme Courts. By the fifth item he declared that at the death of his wife, Margaret, it was his will and desire that all of his property, both real and personal, not disposed of by his will, be divided into ten equal parts, and given to certain legatees therein mentioned.

Complainant claims that he, as the legal representative of Margaret Cotton, who was the sole heir of John Cotton at the time of his death, is entitled to the possession of the two lots of land aforesaid. The bill charges that the defendant claims said lots for the ten legatees, under the aforesaid fifth item.

The defendant demurred to the bill for want of equity. The demurrer was overruled, and defendant excepted.

A. D. HAMMOND, by A. W. HAMMOND & SON; J. S. PINCKARD, for plaintiff in error.

A void disposition is no disposition, and therefore would fall to the legatees under the fifth item : See *Hughes et al. vs. Allen*, 31 Ga. R., 483. The fact that the residuum is divided among ten legatees, or rather given in distinct parcels, that it is presumed that the testator expressed all that they were to have, and that, under 24 Georgia, 84, the legacy would go to the heirs-at-law. The answer is, first, that this is not a lapsed legacy, but a void one, and passes, as first stated ; and again, that the testator intended that the ten legatees should have all his estate after the termination of a life-estate, and not a particular specified estate, divided into parts to negative the idea that they were to only have a particular sum or portion, and no more : 32 Ga. R., 623 ; 31 *Ibid.*, 483.

WHITTLE & GUSTIN, for defendant.

1st. The general principle, as universally decided both in England and the United States, is that lands attempted by a testator to be devised descend to the heirs-at-law, if such devise is void: 2 Redfield on Law of Wills, (second edition,) 115 and note, 117 and note 34; Van Kliek vs. The Ministers, etc., 6 Paige's Chancery Rep., 600; Cox vs. Harris, 17 Md., 23, 31; Tongue vs. Nutwell, 17 Md., 212; 2 Redfield on Wills, (first edition,) 442, 444, and note 34.

2d. The common law, as to descent of real estate, is of force in Georgia, except in so far as it is changed by statute: Caruthers vs. Bailey, 3 Ga., 105.

3d. A devise of lands is considered not so much in the nature of a testament as of a conveyance by way of appointment of particular lands to a particular devisee: Sutton vs. Chenault, 18 Ga., 1; Jones vs. Shewmake, 35 Ga., 151; Gibbon vs. Gibbon, 40 Ga., 562.

TRIPPE, Judge.

The general rule is undisputed that a lapsed or void *legacy* falls into the residuum and passes to the residuary legatee. This is universally so, unless there be something in the will that indicates a contrary intention on the part of the testator, such as existed in the cases of *Hughes et al. vs. Allen*, 31 Georgia, 483, and *Silcox vs. Nelson*, 24 Georgia, 84, and similar cases. But this applies to bequests of personal estate, and as well settled as the rule is in such bequests, it is equally as firmly settled, both in England and the United States, that it does not apply to cases of lapsed or void devises of real estate. In those, it has uniformly been held that such a devise goes to the heir, for Courts will favor such a construction as will give the real estate to the heir: *Ridgely vs. Bond*, 18 Maryland Reports, 433.

The English decisions setting up this distinction commenced about the year 1723: *Goodright vs. Opie*, 8 Mod. Reports, 123; which was followed by several others, finally establish-

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ing it a few years thereafter, so that it has never since been questioned: *Doe vs. Underdown*, Willis, 293; *Wright vs. Hall*, Fortesque's Reports, 182; *Roe vs. Fludd*, *Ibid.*, 184. It has, also, been frequently held that if legacies are directed to be raised out of the proceeds of real estate, and they fail, by reason of the death of the legatee, or are void by statute, the heirs will take instead of the residuary legatee: *Grovenor vs. Hallam*, 2 Ambrose, 645; *Cruise vs. Barlay*, 3 Pierre Williams, 19; see, also, *Arnold vs. Chapman*, 1 Vesey, Sr., 108.

This was unquestionably the settled law in England at the time of our adopting statute, and the decisions have been almost invariably followed in that country ever since; and there is hardly an exception to a long current of adjudications in the United States on the same line: *Cox vs. Harris*, 17 Md., 23; *Helms vs. Franciscus*, 2 Bland., 546; *Green vs. Dennis*, 6 Conn., 292; *Rowlet vs. Rowlet*, 5 Leigh, 26; *Van Klick vs. The Ministers, etc., of the Reformed Dutch Church et al.*, 6 Paige Ch. R., 600. In this last case Chancellor Walworth says: "The right of the heir devolving upon him by operation of law, cannot be impaired by vague surmises of what the testator would or ought to have done if he had foreseen that the disposition he had made of his estate might be declared invalid or ineffectual. An heir-at-law can only be disinherited by express words or necessary implication."

In the case of *Wood et al. vs. Mitchell*, 32 Georgia, 623, there were both real and personal property. The question does not seem to have been made as to the distinction between a void devise of land and a void legacy of personalty. It is not referred to in the decision, and the authorities cited to sustain it are all cases of the latter. LUMPKIN, Judge, in *Hughes vs. Allen*, 31 Georgia, 483, in pronouncing, under the particular terms used in the will, against the residuary legatee in the case of a void disposition of personal property, said: "Believing that the rule has been stretched quite far enough in this direction, (meaning in favor of the residuary legatee,) we are not disposed to make a precedent, extending it one step further."

We know of nothing in any statute of this State which abrogates this rule that has been so firmly settled for a century and a half. The mere fact that personal and real estate are assets subject to the payment of debts does not do it. The title to land, on the death of the owner, immediately vests in the heirs-at-law: New Code, sec. 2483. The title to all other property vests in the administrator, for the benefit of heirs and creditors: Code, sec. 2483. And there are special restrictions on the right of the representative of the estate to recover land from the heirs: Code, sec. 2486. None of these provisions, or any others, can enlarge the principles first stated so that it will include void or lapsed devises of real estate. As well might it be claimed that they repeal the rule altogether, or that they put personalty within the old rule as to realty. As said in *Hughes vs. Allen*, *supra*, we are not inclined to stretch the rule any further, or to make a precedent, and we sustain the Court below in overruling the demurrer.

Judgment affirmed.

MCBRIDE & COMPANY, plaintiffs in error, vs. T. T. BOHANAN, defendant in error.

An assignment by an insolvent debtor for the benefit of his creditors, provided they would take the property thereby conveyed in full satisfaction of their claims, is not binding on a creditor who refuses to accept the same.

Assignment. Debtor and creditor. Before Judge UNDERWOOD. Campbell Superior Court. August Term, 1873.

For the facts of this case, see the decision.

THOMAS W. LATHAM, by A. W. HAMMOND & SON, for plaintiffs in error.

MOBLEY & LESTER, by B. F. ABBOTT, for defendant.

McBride & Company vs. Bohanan.

WARNER, Chief Justice.

This case came before the Court below on a *certiorari* from a Justice's Court. After considering the grounds of error alleged in the *certiorari*, and the Justice's return thereto, the Court sustained the *certiorari* and ordered a new trial; whereupon, the defendant in *certiorari* excepted. It appears from the record that Brantly, an insolvent debtor, made an assignment on the 3d day of February, 1873, by deed, of certain goods, notes and accounts mentioned therein, to Bohanan, in trust, for the benefit of his creditors. Afterwards, McBride & Company, to whom Brantly was indebted on an account for \$47 50, besides interest, sued out a summons of garnishment, and had the same served on Bohanan, requiring him to answer as to his indebtedness to Brantly, and what effects he had in his hands belonging to him.

Bohanan, in his answer to the summons of garnishment, denied all indebtedness, or that he had any property or effects in his hands belonging to Brantly; that the property in his hands which formerly belonged to Brantly he held by virtue of the said deed of assignment in trust for the benefit of his creditors. The plaintiffs in the garnishment traversed the defendant's answer, and, on the trial of the traverse, the plaintiffs in garnishment insisted that inasmuch as there was a memorandum on the back of the deed signed by Brantly stating that when the notes, accounts and goods specified in the deed of assignment should be collected and sold and realized on in cash, and the same applied to the payment of the debts of all his creditors, it should operate as an extinguishment of his entire indebtedness to all his creditors; and it was proved at the trial, as appears by the return of the Justice, that this memorandum on the back of the deed was a part of the original deed of assignment, though not dated or witnessed by any one. It was also proved on the traverse trial that Brantly had other property, not included in the deed of assignment, of the value of \$2,500 00. Several of Brantly's creditors had given their consent, in writing, to the terms of the assign-

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ment, but the plaintiffs in garnishment had not. The Justice gave judgment against the garnishee for the full amount of the plaintiffs' debt, with interest; and the question is, whether Bohanan was liable to have a judgment rendered against him as garnishee, on the foregoing statement of facts. The answer to that question depends on the validity of the deed of assignment, as against the plaintiffs, McBride & Company. By the 1952d section of the New Code, every assignment by an insolvent debtor of his property, in trust, or for the benefit of, or in behalf of his creditors, where any trust or *benefit* is reserved to the assignor, or any person for him, is void as against such creditors.

Brantly, the debtor, stipulated in the deed of assignment for a benefit to himself, to-wit: that it should operate as an extinguishment of his entire indebtedness to all of his creditors. The effect of his deed of assignment was to *dictate* his own terms to his creditors, or to *coerce* them to submit to his own terms. He conveyed a certain portion of his property described in the deed of assignment, for the benefit of his creditors, provided they would take that in satisfaction or extinguishment of all his indebtedness to them.

The benefit reserved to the assignor under such a deed of assignment is to have all his debts extinguished when the property assigned might not pay more than twenty-five cents in the dollar thereof. If the creditors consent to the terms of the assignment, then, as a matter of course, they would be bound thereby, but not otherwise. The question involved in this case was decided by this Court in *Miller vs. Conklin & Company*, 17 *Georgia Reports*, 430. In that case it was held that an assignment by a firm, in insolvent circumstances, of all their assets, for the use and benefit of such creditors as should, within ninety days, file their claims with the assignee and release the said firm from all liability therefor, was illegal and void as against objecting creditors. In our judgment, the Court erred in sustaining the *certiorari* and ordering a new trial.

Let the judgment of the Court below be reversed.

The Home Insurance Company, etc., vs. The City Council of Augusta.

THE HOME INSURANCE COMPANY OF NEW YORK, plaintiff
in error, vs. THE CITY COUNCIL OF AUGUSTA, defendant
in error.

1. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal.
2. The tax called a "license tax," imposed by the City Council of Augusta, by the ordinance of January 5th, 1874, upon insurance companies doing business within the city, is a tax, and not a license.
3. The City Council of Augusta has power, under the charter of the city, to tax occupations, businesses, etc., and a foreign corporation which has an agency and a regular agent for the purpose of transacting its usual business within the city, is liable to be taxed.
4. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property, so as to be subject to the *ad valorem* and uniformity rules of taxation, prescribed by the Constitution, and therefore a tax on fire insurance companies, different from what is imposed on life insurance companies, does not make the tax obnoxious to any constitutional requirement.

License. Tax. Foreign corporations. Constitutional law.
Before Judge GIBSON. Richmond county. At Chambers.
May 9th, 1874.

On January 5th, 1874, the City Council of Augusta passed the following ordinance:

"AN ORDINANCE to amend an Ordinance entitled 'An Ordinance to assess and levy taxes for the support of the municipal government of Augusta,' etc.

"SECTION I. *Be it ordained by the City Council of Augusta, and it is hereby ordained by the authority of the same,* That from and after the passage of this ordinance, the annual license tax on insurance companies shall be as follows: 1. On each and every life insurance company located, having an office or doing business, within the city of Augusta, \$100 00. 2. On each and every fire, marine or accidental insurance company located, having an office or doing business, within the city of Augusta, \$250 00."

On April 4th, 1874, the Home Insurance Company of New York filed its bill to enjoin the collection of the license tax as-

50	530
80	642
50	530
100	76
100	77
100	78
50	530
112	167

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passed in section one of this ordinance. The bill states that the Home Insurance Company of New York is a fire insurance company, incorporated under the laws of the State of New York, and that it was, on the 1st of January, 1874, and thence continued to be, and now (for the year 1874 and sixty days thereafter) is, authorized to transact business of insurance in the State of Georgia, under an Act of the General Assembly of Georgia, entitled "An Act to regulate insurance business and insurance agencies in the State of Georgia," approved March 19, 1869, and commonly known as the Insurance Act, and that under such authorization it was, on the 1st of January, 1874, and has since been, and now is, transacting said business in Augusta. The bill then sets forth the ordinance above cited, and charges that so much thereof as assesses a license tax on fire insurance companies is illegal, null and void, for these reasons: that the City Council of Augusta has no right to assess any tax on any incorporated company doing business in that city; that if said Council ever had such authority, it was taken away by the Insurance Act aforesaid; that the ordinance is repugnant to the Constitution and laws of the land; is in restraint of trade; is unreasonable, unfair, partial and oppressive; is in direct opposition to a general statute, to-wit: the Insurance Act aforesaid; is in derogation of common right; contravenes the public policy of the State; virtually imposes a double tax; uses the police power for revenue; violates the Constitution of the State by specially varying a general law without the free consent, in writing, of those to be affected thereby, and by taking private property for public use without just compensation; and violates the Constitution of the United States by impairing the obligation of that contract between the company and the State of Georgia, whereby the company has authority to transact business of insurance in said State. The bill then proceeds to charge that none of these objections are obviated or avoided by the fourth section of an Act of the General Assembly of Georgia, entitled "An Act to authorize the City Council of Augusta to fix a penalty for failure to make tax returns or pay the same, and to en-

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force the collection of the same by execution," approved February 26, 1874, which section reads as follows :

"SECTION IV. *Be it further enacted by the authority aforesaid*, That all ordinances heretofore passed by the City Council of Augusta for the levying, assessing and collecting any taxes for the support of said municipal government for the year 1874, be, and the same are hereby declared to be of full force and effect until altered, changed, modified or repealed by said City Council."

The bill charges that said Act of February 26, 1874, is, in this fourth section, null and void, as containing matter different from that expressed in the title thereof; as impairing the obligation of that contract between complainant and the State of Georgia, whereby complainant received authority to transact business in Georgia; as specially varying a general law without the free consent, in writing, of those to be affected thereby; as conferring upon a municipal corporation power to repeal a general State law; as validating penal ordinances, and hence being an *ex post facto* enactment; as being a retrospective Act, divesting complainant of previously accruing rights; and as partial, unequal, oppressive, and contrary to good faith, good conscience, fair dealing and natural justice. The bill then sets forth that a large number of fire insurance companies doing business in Augusta coincide in these views, and that consultation has been had by and between these companies and complainant, and, in pursuance of an understanding arrived at upon such conference, complainant brings this bill.

Prays that the City Council of Augusta be enjoined from collecting the license tax assessed in section one of the ordinance of January 5th, 1874, on complainant.

An amendment to the bill sets forth that the license tax assessed by said ordinance on insurance companies is made payable by the City Council of Augusta unto and at the office of the collector and treasurer of the city of Augusta, and several companies doing business in said city have paid

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such license tax, among others the Insurance Company of North America, and that record of such payment is kept in a book in the collector and treasurer's office, called "The License Book for 1874," and in the same book are kept the record of license fees paid by peddlers, barbers, green grocers, and others required by the City Council to purchase, annually, the privilege of doing business; that on each of these payments, whether by insurance companies, organ grinders, or others required to take out license, a coupon is cut from a "stub" or memorandum in said book, bearing the same date, name, number, amount and description as in the case of a check book, and that the form of the coupon in each case is as follows:

No.....	CITY BUSINESS LICENSE.
	AUGUSTA, GA.,.....18....
Received of.....	Dollars
	100
For License as.....	
at No.....street, which entitles.....	to carry
on said business until the thirty-first day of December next.	
\$.....
	Collector and Treasurer C. A.

In its answer to the bill, the City Council of Augusta prays that complainant be put upon legal proof of having received authority, under the Insurance Act aforesaid, to transact business of insurance in Georgia; admits the passage of the ordinance complained of, and avers it to be legal and valid, and not in violation of any law of the State or of the United States, nor of the public policy of either; charges that the fire insurance companies of Augusta have recently raised their rates from fifty to three hundred per cent., and the license tax is therefore not unreasonably or unjustly high; claims that the taxing power of the City Council, as regards insurance companies, is not exhausted by the imposition of a tax on their gross premiums; says that the Legislature, by Act of February 26th, 1874, confirmed and validated the ordinance com-

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plained of; and states "that within the jurisdiction of said city, and operating upon the subjects of taxation, the rate of taxation to be imposed by said City Council, is within their discretion, without liability to any Court or other authority except their constituency." In an amendatory answer the City Council admits the correctness of all of complainant's statements relative to the license book kept at the collector and treasurer's office, but claims that the form of coupon was adopted by the collector and treasurer on his own mere motion and for his own convenience, and that such coupon is really a mere receipt for a tax, and that licenses proper are only issued in Augusta by the clerk of Council.

An affidavit of the Mayor of Augusta, to the effect that the collector and treasurer adopted the form of the license book for his own convenience, accompanies the amendatory answer.

The Chancellor refused the injunction, and complainant excepted.

SALEM DUTCHER, for plaintiff in error.

The ordinance in question imposes either a tax or a license fee, and in either event is void. If a tax—

1st. The taxing power of the City of Augusta extends only to "inhabitants" of or "taxable property" within that city: 5 Ga., 561; 26 *Ibid.*, 651.

2d. Plaintiff, being an incorporated company, is not an "inhabitant" of Augusta: 14 Ga., 327; 17 *Ibid.*, 330; 28 *Ibid.*, 121.

3d. Nor "taxable property" within Augusta: 37 Ga., 620.

4th. If a tax on property, this is illegal, as being neither *ad valorem* nor uniform: Const., Art. I., sec. 27; 41 Ga., 21; 44 *Ibid.*, 394; 47 *Ibid.*, 562.

5th. If a special tax on business, this is illegal, one such tax being already imposed on plaintiff by Council: 24 La. Ann, 112.

1st. If a license fee the City Council of Augusta has no authority to license insurance companies: 30 Ga., 679; 42 *Ib.*, 325; 19 Minn., 267.

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2d. The ordinance assumes to regulate in one way that which the State has, by general law, regulated in another, and is therefore repugnant to statute and so void: *Dudley's Rep.*, 30; 4 Ga., 509; 18 *Ib.*, 586; 21 *Ib.*, 80; 29 *Ib.*, 56; 30 *Ib.*, 679.

3d. The State having licensed plaintiff, the city cannot require license from itself as a condition precedent to the lawful exercise in the city of the right conferred on plaintiff by the State: 5 Ga., 447; 29 *Ib.*, 333; 36 *Ib.*, 460.

The ordinance is not validated by the fourth section of the Act of February 29th, 1874. Said Act in that section is void:

1st. As impairing the obligation of contract: 5 Ga., 447; 10 *Ib.*, 190 (5); 12 *Ib.*, 239; 14 *Ib.*, 447; 45 *Ib.*, 331; *Rerick vs. Kern*, 14 Serg. & Rawle, 267 (2 Am. Leading Cases, 733;) *State Bank of Ohio vs. Knoop*, 16 How., 386; *State vs. Schlien*, 3 Heiskell, Tenn., 281; *Minot vs. The P. W. & B. R. R. Co.*, Am. Law Times, December, 1870, page 196.

2d. As containing matter different from that expressed in title: 4 Ga., 26; 6 *Ib.*, 21; 12 *Ib.*, 31 *Ib.*, 69; Const., Art. III., sections 4, 5.

3d. As specially varying a general law: Const., Art. I., section 26.

4th. As empowering a City Council to repeal a State law: 12 Ga., 404 (5.)

J. C. C. BLACK; H. CLAY FOSTER, for defendant.

By section three of the Act of incorporation, the City Council of Augusta has authority to make such assessments *on the inhabitants of Augusta*, or those who hold taxable property within the same, * * as shall appear expedient, etc: See charter, Act of 1798, section 3; see Act of December 24th, 1835; 37 Ga., 598; 47 *Ibid.*, 562.

A corporation is an inhabitant within the meaning of the charter: *Bank of the United States vs. Devereux*, 5 Cranch, 89, 197; *Beaston vs. The Farmers' Bank of Delaware*, 12 Peters, 102, 134; *The Louisville, Cincinnati and Charleston Railroad Company vs. Thomas W. Letson*, 2 Howard, 497—

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last part of the decision; *The People vs. The Utica Insurance Company*, 15 Johns, 382; *The South Carolina Railroad Company vs. McDonald*, 5 Georgia R., 341; *Cromwell vs. Charleston Insurance and Trust Company*, 2 Richardson, S. C., 512; *Glaize vs. South Carolina Railroad Company*, 1 Strobbart's Law Reports, page 70. "Person" includes a corporation: Code, section 5. Are not corporations included in the term "inhabitants" in sections 3 and 7 of the Code.

The term "taxable property" embraces every subject of taxation not exempted by law from taxation: *City Council of Charleston vs. Condy*, 4 Richardson's Law Reports, 254; *State vs. City Council of Charleston*, 5 *Ibid.*, 561-4; *State vs. City Council*, 10 *Ibid.*, 240.

The tax in question is not such a tax upon property as must be *ad valorem*: 42 Georgia., 596; *John A. Bohler, tax collector, vs. E. R. Schneider et al.*, decided at July term, 1873; *McWilliams & Company vs. Rome*, decided at the present term.

In the case of the *City Council of Augusta vs. Walton & Walton, assignees, etc.*, 37 Georgia, 620, that was a tax on the franchise, the banks having suspended business, and the decision was put upon the ground that, under the law as it then was, only the capital of incorporated companies was taxable.

The tax Acts of 1873, 1874, tax not only the premiums received by insurance companies, but the agents of all companies: See Act 1873, sections 2 and 4; Act of 1874, sections 2 and 4.

The State taxes occupations and professions, as attorneys, doctors, and others, and also sewing machine companies: See Tax Acts 1868, 1869, 1873, 1874. An occupation or business is taxable property under our law: See above Acts, and 42 Georgia, 599; and this being so, no special authority to levy such a tax is necessary: 47 Georgia, 562.

This case is clearly distinguishable from the *Charleston case*, reported in 36 Georgia, 460. There is nothing in the record in this case to show that this company ever complied with the Act of 1869 and was licensed by the State.

TRIPPE, Judge.

1. There is a clear distinction recognized between a license, granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in: 42 *Georgia*, 596. A license is a right granted by some competent authority to do an act which, without such license, would be illegal. A tax is a rate or sum of money assessed on the person, property, etc., of the citizen: *Bouv. L. D.*; 36 *Georgia*, 460. A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation: *Cooley's Const. Lim.*, 201. The tax assessed upon complainant by the City Council of Augusta, by the ordinance of January 5th, 1874, although called a "license tax," is more properly a tax than a license fee, or a fee exacted in order to secure the right to engage in a business which, without paying for and obtaining such authority, would be illegal. The title of the ordinance is, "An ordinance to amend an ordinance to assess and levy taxes for the support of the municipal government of Augusta," etc. The amended ordinance has these further words in its title, "and for the payment of the interest on the funded debt of said city." It is true, this last mentioned ordinance, which is so amended, refers to the "subjects and rates of taxation and license;" but by referring to the ordinance of December 28th, 1872, entitled "An ordinance to fix the annual and specific taxes of the city of Augusta," etc., and which was continued in force by said amended ordinance, it will be seen that there was a special tax of \$100 00 assessed upon such companies as that of complainants. This is the first ordinance, so far as the record shows, assessing such a tax. In that ordinance, both in the title and the enacting clause, it is called a tax. In the second and third sections, it may be that a license is provided for in the cases of two classes of business, and in those sections they are denominated licenses; but the assessment made by it on insurance companies is clearly a

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tax. If not, the whole ordinance is not what its title and body purport it to be, and is only a series of provisions for licenses. This ordinance, as before stated, was continued in force by the one of December 23d, 1873, and this last is the one which was amended by the ordinance of January, 1874, against which complaint is made.

2. No penalty has been imposed on complainant for non-payment of the "license tax," or for engaging in business before it was paid, or without a license. No complaint is made for the purpose of arresting proceedings of that character, but the objection is, that the City Council cannot require complainant either to take out a license or to pay any tax to the city; that, having obtained the right to transact its business by the authority of the State, it is subject to no further liability, either as a condition precedent to the exercise of such right, or as a tax upon it after it has engaged in such business. Had it been required by this ordinance that complainant should procure a license before it could transact its business, and a penalty had been imposed for failing so to do, and the complaint was against the enforcement of the penalty, a different question, under the decisions of this Court, would have been presented. But there is a plain distinction between this case and that of the *Mayor, etc., of Savannah vs. Charlton*, 36 *Georgia*, 460. There the contest was as to the right of the city to impose upon Dr. Charlton the penalty prescribed by the ordinance for practicing as a physician without taking out a license from the city. It is stated in the decision that the physician was "not contesting the authority of the city to tax him for practicing his profession; what he contends for is, that the city shall not make that illegal which, by the law of the State, is legal." And it is immediately added: "We see no good reason why the city may not tax the practice of any profession within the corporate limits of the city." This much, with reference to the position assumed for plaintiff in error, that under the Act of March 19th, 1869, it having obtained from the Comptroller General the "certificate of authority to transact business of insurance in this State," no other liability

or tax could be imposed. It may further be said that if this be so, then the State would be equally bound by its own contract, and would, no more than a municipal corporation, have power to assess any further tax upon such companies, or upon any person to whom a license had been granted by its authority to practice a profession or engage in any business. And yet the lawyer, the physician, and many others, have licenses granted by the State, or directly by its authority—have paid the fee for the same, and have ever been held subject to be taxed on the very business or profession covered by that license. Probably not a general tax Act has been passed for half a century, or longer, which has not done this very thing. And it may be added that the Legislature never thought that the regulations for insurance business and insurance companies prescribed by the Act of 1869, deprived it of the power of taxing such business or companies, for it has uniformly, since that time, as well as before, assessed a tax on both. And, indeed, on the 18th of March, 1869, an Act was approved levying a specific tax on all premiums received by all insurance companies doing business in this State, both home and foreign: See *Burch et al. vs. The Mayor, etc., of Savannah*, 42 Georgia, 596.

Complainant, admitting the power in the State to tax business, callings, etc., and also in certain municipal corporations, to levy the same under the special terms of their charters, yet denies that the charter of the city of Augusta confers this power on the Mayor and City Council. The words of the charter are, "to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, as may seem expedient," etc. What is the meaning of the words, "assessments on the inhabitants?" It certainly authorizes a tax on property. Is it limited to that? If so, why? Businesses, occupations and professions are as equally the subject of taxation as property, and have been as regularly taxed as any real or personal property: *Cooley's Const. Lim.*, 479. If the "assessment" is not limited to the person, such as a capitation or poll tax, what is there to confine it to any one

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subject matter of taxation? It has always been the rule of the Legislature of this State to assess a tax on property, on business, and also a capitation tax; and when taxation is referred to, the power to "make assessments" includes the power to assess all three, unless there be some other provision to limit it. If it does not extend to the power to levy a tax on business, etc., then it would, in this case, be restricted altogether to property. For, by the Constitution of 1868, there can be but one poll tax, and that to the amount of \$1 00, and only for educational purposes. This is levied by the State. The State does not tax income, and it has been held that, therefore, a municipal corporation cannot: 8 *Georgia*, 23. In the case just referred to, *The Mayor, etc., of Savannah vs. Hartridge*, 8 *Georgia*, 23, it was ruled that "the history of the legislation of the State, in reference to a particular subject matter of taxation, may be referred to as tending to aid in the construction to be given to the statute; and where the State has never taxed income, the power to do so in a corporation must appear by express words or unavoidable implication." Hence, though the statute in that case gave the city of Savannah authority to tax "real and personal estate," yet, in getting at the meaning of the Act, it was held that, as the State had never made income a source of revenue as taxable, it was not the intention of the Legislature to give the power to a subordinate authority. If the absence of such a custom or practice on the part of the Legislature was a criterion in construing that statute, would not the fact that the legislation of the State had fixed a contrary policy in the matter of taxing occupations, tend equally to aid in reaching the meaning of the general words, "power to make assessments on the inhabitants," etc., when used in a city charter?

3. But it is further objected by plaintiff in error that a foreign corporation, although it has officers, and an office, and is doing business in the city of Augusta, is not an "inhabitant" in the true intent and meaning of that word as used in the charter, and therefore not liable to be taxed. We are aware of the thorough discussion before many Courts, the question

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whether a corporation is an "inhabitant," has undergone. Lord Coke, 2 Ins., 703, says, "Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, etc., *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute." He referred to the statute of Henry VIII., concerning bridges and highways, which enacted that bridges and highways shall be made and repaired by "the inhabitants of the city, shire or riding," and that the Justices shall have power to tax every "inhabitant of such city," and the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels." In the case of the King vs. Gardner, Couper, 79, a corporation was decided to come within the description of "occupiers or inhabitants." In *Beaston vs. The Farmers' Bank of Delaware*, 2 Peters, 102, the Supreme Court of the United States says, "that corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons, expressly included in a statute." And this rule was recognized in *South Carolina Railroad Company vs. McDonald*, 5 Georgia, 531. See *Louisville Railroad Company vs. Letson*, 2 Howard, 497; modifying the decisions in *Bank of the United States vs. Deveaux*, 5 Cranch, 84, and *Strawbridge vs. Curtis*, 3 Cranch, 267; see, also, *The People vs. The Utica Insurance Company*, 15 Johns, 358. In *Davis and Redding vs. The Central Railroad and Banking Company*, the judgment of the Court was, not that a corporation was not an inhabitant, but that where a charter of a railroad provided that "the principal office of the company shall be located at Savannah, with subordinate officers or agencies at Macon and such other places as the board of directors shall determine, and all elections and meetings of stockholders shall be held at such principal office only," it was said that "this is not the same as would have been a provision that the corporation shall be established at Savannah." The case arose upon the question of the unconstitutionality of an

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Act of the Legislature making the road liable to be sued for killing live stock in the county where the damage was done. It was held that the Act was constitutional, and that the Legislature had power over the question of what shall be the place of residence of a corporation. Judge BENNING, in his opinion in that case, seems to object pretty strongly to the English rule as given by Coke, but stated that it was not necessary to hold that it was not the law in this State, in order to reach the conclusion to which the Court came. Indeed all the cases either directly or indirectly admit that a corporation is an inhabitant for the purposes of taxation. Nor is the case in 5 Cranch, *supra*, in conflict with this, for in that it is said of a corporation, "this ideal existence is considered as an inhabitant where the general spirit and purposes of the law require it." This is substantially what was said in 2 Peters, *supra*, and to show the force that was given to it, it is quoted in the opinion in Louisville Railroad Company vs. Letson, *supra*, and the question immediately put, "if it be so for the purposes of taxation, why is not for the purpose of a suit, etc.?" and then it is added, "certainly the spirit and purposes of the law require it." The fact that complainant is a foreign corporation, does not affect the question as to its liability to taxation. It may contract in this State—purchase, and the State could authorize it to hold real estate: The Union Branch Railroad Company vs. The East Tennessee and Georgia Railroad Company, 14 Georgia, 327. In the Bank of Augusta vs. Earle, 13 Peters, 588, TANEY, Chief Justice, says, "it is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the law of that place to exercise there the powers with which it is endowed." This was said with reference to the rights which a corporation may enjoy outside of the State of its creation. If it held property in another State, would not that property be subject to be taxed by that State, and equally with other similar property by the municipal corporation within whose limits the property was? If

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it enjoy other privileges or rights within that same municipal corporation, is it not liable to the same taxes as other inhabitants? We think that upon principle and authority, it is.

4. It was further objected by complainant that the tax upon fire insurance companies being different from that on life insurance companies, made it obnoxious to that provision of the Constitution which requires that "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed." In the cases of *Burch vs. The Mayor, etc., of Savannah, supra*, and *Bohler vs. Schneider*, 49 Georgia, 195, it was held that a tax on professions, business, etc., was not a tax on property, so as to be subject to the constitutional requirements of uniformity, and that it must be *ad valorem*. In the case of *The Bank of the State of Georgia vs. The Mayor, etc., of Savannah*, *Dudley's Reports*, 130, it is said, "Every man's private business, pursuit or calling, are things in which he has an interest, and many species of employments are legitimate subjects of taxation, and are taxed. Still, they are not, strictly speaking, property. They are the means from which income is derived—property made. But there is a clear distinction between the employment and the income or profits." The tax Acts of the State, assessing taxes on professions, etc., vary the tax from ten dollars to ten or twenty times that sum. And this has been so in every tax Act which has been passed since the uniformity and *ad valorem* rule has been in the Constitution. This contemporaneous, unbroken, practical exposition of the meaning of the Constitution by all departments of the State government, should not be disregarded in the search for the true interpretation of the provisions we are considering. By the light of this and the principles and authorities cited, we conclude that the Court below did not err in refusing the injunction prayed for.

Judgment affirmed.

Wardlaw vs. Wardlaw.

JAMES C. WARDLAW, administrator, plaintiff in error, vs.
JOSEPH M. WARDLAW, defendant in error.

1. An attachment was, by mistake, levied on the wrong lot of land. Judgment was entered in pursuance with the levy. The plaintiff filed a bill to correct the mistake. This proceeding was dismissed at the trial term on demurrer :

Held, That such dismissal was error. A Court of equity having obtained jurisdiction, should have proceeded to have heard the case, and have rendered such decree as the ends of justice might have required.

2. Where lot two hundred and eighty-seven is intended to be levied on by an attachment, but the entry of the sheriff describes lot two hundred and sixty-eight by mistake, there has been, in fact, no levy made on the right lot.

Equity. Mistake. Levy. Execution. Before Judge UNDERWOOD. Walker Superior Court. August Term, 1873.

For the facts of this case, see the decision.

D. C. SUTTON; WARREN AKIN, for plaintiff in error.

J. E. SHUMATE, by brief, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant to correct a mistake made by the sheriff in reciting the wrong number of a lot of land in his levy of an attachment. The defendant demurred to the complainant's bill, for want of equity, which demurrer was sustained by the Court, and the complainant excepted. The complainant alleges that the sheriff of Walker county entered a levy of the attachment upon a lot of land belonging to Joseph M. Wardlaw, and on which he had formerly resided, and on which he had a tenant, or tenants, and by mistake called the lot so levied on number two hundred and sixty-eight, in the seventh district of the fourth section in said county, believing that was the lot levied on; that the lot of land number two hundred and sixty-eight, in the seventh district of the fourth section, is not the property of said Joseph M. Wardlaw, and that said lot was not,

in truth and in fact, levied on by the sheriff, but that the levy was really made on lot of land number two hundred and eighty-seven, in the seventh district of the fourth section of originally Cherokee, now Walker county, and was entered on the back of the attachment as having been made on lot two hundred and sixty-eight by mistake, the sheriff being misinformed as to the number of the lot levied on; that the wrong number in the levy of the attachment and in the judgment on the same is the result of mistake. It also appears that a judgment was entered on the attachment for the sale of lot number two hundred and sixty-eight, and execution issued thereon. The prayer of the bill is, that the mistake in the levy of the attachment, and in the judgment of the Court, be corrected, and that said judgment, when corrected, stand as if the right number of the lot of land in fact levied on had been inserted in said levy, and no mistake had been made by the insertion of the wrong number, or such other relief as the ends of justice may require.

1. In view of the facts of this case, we think the Court erred in dismissing complainant's bill. The complainant was entitled, in consequence of the alleged mistake, to have had the judgment against lot two hundred and sixty-eight set aside, and although this might have been done at law, still, a Court of equity having concurrent jurisdiction as to the correction of the mistake, and having first acquired it, the Court should not have dismissed the bill at the trial term of the cause, and turn the complainant round to seek his remedy in the common law Court. The Court, having obtained jurisdiction of the case and the parties, should have proceeded not only to have set aside the attachment judgment against lot number two hundred and sixty-eight, but should have proceeded to have heard the complainant's demand, allowing the defendant's defense thereto, if any, and have rendered such judgment or decree between the parties as the ends of justice might have required, in view of the facts of the case.

2. It is quite evident there was no levy of the attachment on lot number two hundred and eighty-seven, therefore, the

complainant is only entitled to have the judgment on the attachment which was levied by mistake on lot two hundred and sixty-eight set aside, and such other relief as he may be entitled to on the hearing of the cause, as above indicated.

Let the judgment of the Court below be reversed.

AUGUSTUS J. MERCIER, plaintiff in error, vs. GEORGIA A. MERCIER, defendant in error.

[This case was argued at the last term and decision reserved.]

A verbal contract between two children, made during the life of the father, by which they sought to avoid the disinherison of one of them, which was threatened by the father, should a marriage contemplated by said child take place, by which they agreed to divide the property between them, no matter what might be the parent's will, cannot be enforced in equity on a bill for specific performance. (R.)

Specific performance. Wills. Parent and child. Contracts. Before Judge CLARK. Early Superior Court. April Term, 1873.

Georgia A. Mercier filed her bill against her brother, Augustus J. Mercier, charging, in substance, that in 1868, her father, George W. Mercier, died testate, and by his will gave his whole estate, with nominal exceptions, to complainant's brother, who had taken possession of the same; that in 1863, her brother, much against her father's will, was engaged to be married to his present wife; that the father threatened to disinherit the son if he persisted in his intention, and that he would give him nothing during the father's life, or at his death, but would give all his property to complainant; that complainant favored the marriage, and her brother proposed to her, that if she would agree, in the event that their father did give her his property, to divide it with him, "he would brave his father's anger and consummate his intention towards the lady to whom he was then engaged, and that should

their father afterwards relent towards his son and for any cause give him all his property, then he would do the same by complainant as he asked of her to do by him ;" that her brother urged this proposition on her, as their father was of irate and hasty temper, and there would be a large property for both ; that complainant was induced by this, and by the further fact that the betrothed of her brother would not consummate the marriage on account of said threat of her father, unless complainant would accede to the proposition of her brother, to agree with him that they would equally divide between them the property of their father, at his death, without regard to which one it might be given ; that a short time after the understanding thus made complainant's brother did marry the young lady to whom he was engaged ; that the father afterwards made his will as above stated, and her brother refuses to carry out said agreement ; that this contract was made without the knowledge of the father, and was kept secret from him, unless the brother fraudulently disclosed it.

It is not charged in the bill that he did disclose it, or that the father ever heard of it.

The bill prays for a specific performance. A demurrer was filed on the following grounds :

1st. Want of equity.

2d. That the interest of the parties in the subject matter of contract set forth was too remote and contingent to support a contract.

3d. That the alleged contract is illegal, immoral and contrary to public policy ; and,

4th. The statute of frauds.

It was admitted that the contract set up in the bill was by parol.

The demurrer was overruled, and defendant excepted.

JOHN C. RUTHERFORD ; A. HOOD ; J. E. BOWER, for plaintiff in error.

H. & I. L. FIELDER, for defendant.

TRIPPE, Judge.

It may truly be said in this case, as was remarked by Lord Eldon in the case of *Gordon vs. Gordon*, 3 Swanston, 400, which bears some resemblance to this: "I have never known a case in which it was more the duty of a Judge to make a covenant with himself not to suffer his feelings to influence his judgment." But outside of what may be considered the personal or private obligations between these parties, or as to what would be right between a brother and sister, there is a cardinal principle involved almost of universal application, and which is fatal to complainant's case. It is that which is raised by the third ground taken in the demurrer. That ground is, that "the alleged contract is illegal, immoral and contrary to public policy."

It is not denied that it has been frequently held, both in English and American cases, and by this Court, that parties interested in the estate of a deceased person, or who have expectations of being such, may contract between themselves as to how the same shall be divided, if the contract be fair and without fraud. But in nearly all of those cases the decisions are put on the ground, either that the agreements had been made to avoid or settle family controversies, to adjust doubtful rights, to preserve the harmony and affection or honor of the family, or that there was a valuable consideration. I will refer to a number of them: *Watkins vs. Watkins*, 24 *Georgia*, 402, was a case of an agreement to settle a doubtful right, and to prevent a family controversy. The father had died, and some of the children were about to caveat his will. In *Fulton vs. Smith*, 27 *Georgia*, 413, the agreement recited that the father had divided his property unequally, which was not his intention when he was of a sound and disposing mind, and for that and other reasons stated, the children made a special agreement, which was enforced. So in *Smith vs. Smith*, 36 *Georgia*, 184, the father had died, and the heirs were in doubt whether there was a will. One of them knew there had been a will about a year previous. He was almost the

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sole legatee under it, and he had been officious in getting it up. In his presence, the other heirs, who had heard of the will, were discussing the matter, and one of them denounced such a paper as a fraud procured by the chief legatee in it, and declared that its probate would be resisted. In this state of matters, as the bill charged, the agreement for a certain division was executed between the heirs. The will was afterwards produced by the son who was the chief beneficiary under it, and who refused to abide by the agreement. On a bill filed by the others, it was held that a demurrer should be overruled, and that the agreement could be enforced. *Bailey vs. Wilson*, 1 Devereaux & Battle, 182, was a case on an agreement to make a specified division of a father's estate, in order to prevent a contest over his will. In *Price et al. vs. Winston et al.*, 4 Munford, 63, it was ruled that an agreement to divide property, given by a will, between all the heirs-at-law, although certain ones did not take by the will, might be enforced, on the ground that those who did take, but whose interest was contingent, would, under the terms of the agreement, obtain a certain interest instead of the uncertain and contingent interest created in the will. These are some of the cases decided in this country. I have seen none (American) where the agreement was made after the death of the ancestor, in which the decision was not put on some special ground, such as those stated in these cases. As to agreements with reference to expectancies, I will notice them hereafter.

In *Pullen vs. Ready*, 2 Arkansas, 587, the agreement was about property bequeathed by will. Lord Hardwick sustained it on the ground that it had entirely settled all disputes between the parties and their several rights. *Cory vs. Cory*, 1 Vesey, Sr., 19; *Neal vs. Neal*, 1 Keen's Reports, 672; *Stapleton vs. Stapleton*, 1 Arkansas, 2; *Stockley vs. Stockley*, 2 Ves. and Beam., 23, are all cases arising on contracts of the nature of family arrangements. The decisions in them are put on the ground as stated by Sugden, Chancellor, cited in note on *Stapleton vs. Stapleton*, 2 Wharton & Tucker's Equity cases—"that whenever doubts and disputes have arisen with regard to the rights

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of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or save the honor of the family, those arrangements have been sustained by Courts of equity, albeit, perhaps, resting on grounds which would not have been satisfactory if the transaction had occurred between mere strangers." I might ask just here, does this contract, sought to be enforced by complainant's bill, come within this rule or within the principle of any of these decisions? Was any doubtful right compromised? Was any *family controversy* prevented or settled? Did it tend to preserve the harmony and affection or the honor of the family? Was it not rather a confederacy of the children to execute their own purposes despite their father; to defy him whilst living, and thwart his wishes after his death? In other words, it was intended to fortify the brother and only son, so he could, without fear, reject parental advice, and in the words of the bill, "brave his father's anger." But more of this hereafter. I have not been able to find but one American and two English cases which grew out of agreements made by children, or by those who had reasons for expecting a share of the estate of a friend or relation, for the purpose of controlling the divisions of such *expectant* interests between themselves. The case of *Lewis vs. Madison*, 1 Munford, arose on a contract under seal between two brothers, by which one of them, for a *fair and valuable consideration*, agreed, that, when he should obtain possession of a tract of land expected to be devised to him by their father, he would convey it to the other. It was held that such a contract was not *contra bonos mores*, and would be enforced. *Hobson vs. Trevor*, 2 Pierre Williams, 191, is not one of the two English cases referred to above. The agreement there was by a father to convey, in consideration that the plaintiff married his daughter, one-third of what the obligor might receive of *his* father's estate, to the expected son-in-law. The marriage was consummated. Macclesfield, Lord Chancellor, said, "this is an agreement made upon a *valuable consideration*, that of the marriage of a *child*, and therefore fit to be executed in equity."

Beckley vs. Newland, 2 *Ib.*, 182, and *Wethered vs. Wethered*, 2 *Simon's Reports*, 183, are the two cases in which it was directly held that an agreement stipulating that whatever the sons, in one case and the presumptive heirs in the other, might receive by will or by descent, should be equally divided between them, was good and not contrary to public policy. There was, in neither of these cases, any qualification such as was put in the decisions of those that have been cited. It was ruled, that "the agreement to share equally would not be disappointing the intent of a testator, for he did not design to put it out of either of the devisee's power to dispose of the estate after it should come to him ; but, on the contrary, when the testator gave it to either of them, he, by implication, gave that person a power to dispose of the said estate when it should come to him." In the latter of these two cases, the Vice Chancellor referred to that of *Harwood vs. Tooke*, which, he stated in his opinion, upheld the decision he then pronounced.

It is not necessary to dispute the authority of these decisions (which we do not,) to sustain the judgment we render. In neither of them was it the purpose of the contracting parties to defy the authority or advice of a parent, or one standing in *loco parentis*. They did not have for their object the accomplishment of a purpose directly contrary to the anxious desire of a living father, that would induce a son to place himself in hostility to that father, and which, under his well known and avowed wishes, instead of maintaining family harmony and affection, would create discord between parent and child, and probably sever the relations then existing between the father and both of these children, his only children. This contract between complainant and her brother had for its declared object the repudiation of a parent's advice and authority, so that both might be set aside during his life, with a guaranty of impunity to the son for any disobedience or want of filial loyalty on his part. How different was the spirit and intent of this contract from what Judge Story says is the reason why the agreements in the cases cited have been

sustained. In referring to these decisions, he says, "such agreements are generally made to suppress fraud and undue influence, and cannot be truly said to disappoint the testator's intention :?" Story's Eq., sec. 265.

The law has a high regard for parental authority, and will give effect to nothing which tends to encourage disobedience to it. The same eminent jurist just cited, in speaking of contracts having that effect, after referring to post-obit bonds, and contracts affecting the marriage of children, adds: "When, indeed, the obligation to marry is reciprocal, although the marriage is to be deferred to a future period, there may not be, as between the parties, any objection to the contract in itself, if, in all other respects, it is entered into in good faith, and there is no reason to suspect fraud, imposition or undue influence. But even in these cases, if the contract is designed by the parties to impose upon third persons, as upon parents, or friends standing in *loco parentis*, or in some other particular relation to the parties, so as to disappoint their bounty, or to defeat their intention in the settlement or disposal of their estates—then, if the contract is clandestine, and kept secret for this purpose, it will be treated by Courts of equity as a fraud upon such parents or friends, and, as such, be set aside, or the equities will be held the same as if it had not been entered into. The general ground upon which this doctrine is sustained is, that parents and other friends standing in *loco parentis* are thereby induced to act differently in relation to the advancement of their children and relatives, from what they would if the facts were known; and the best influence which might be exerted in persuading their children and relatives to withdraw from an unsuitable match is entirely taken away. To give effect to such contracts would be an encouragement to persons to lie upon the watch to procure unequal matches, against the consent of parents and friends, and to draw on improvident and clandestine marriages, to the destruction of family confidence and the disobedience of parental authority. These are objects of so great importance to the best interests of society that they can scarcely be too deeply fixed in

the public policy of a nation, and especially of a Christian nation."

This long extract is given to show how jealous the law is of whatever tends to the destruction of family confidence, or to induce the disobedience of parental authority. It may be added that no Court has ever upheld an agreement which had that effect—which, on its face, discarded the authority of a living parent, and bargained for post-obit immunity for the one who repudiated that authority.

I have made no reference to a large class of cases, involving secret contracts with third persons, strangers to the family, as to the marriage of a son or daughter to such third person, with a penalty annexed in case of non-performance. In none of these cases, if the contract contravened the authority of the parent or the person in *loco parentis*, or was made in defiance of his known wishes, was the agreement upheld. And the ground upon which their rejection is chiefly put is, that they operate as a fraud upon, and are subversive of the rights, interests and authority of parents.

There are other grounds taken in the demurrer upon which some of the members of this Court have doubts; but it is unnecessary to discuss them, as the judgment rendered finally disposes of the case. The demurrer ought to have been sustained.

Judgment reversed.

WILKINS W. JACKSON *et al.*, executors, *et al.*, plaintiffs in error, vs. JAMES M. WILLIAMS *et al.*, defendants in error.

[TRIPPE, Judge, having been of counsel, did not preside in this case.]

The testator, by his will, authorized his executors to sell his property upon such terms as to notice or credit, as they might, in their sound discretion, deem best:

Held, That the executors had the power to sell the property without an order from the Ordinary, either for cash or credit, and upon such no-

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tice as they, in their sound discretion, might deem best; but in all other respects they were bound to comply with the law regulating such sales.

Administrators and executors. Wills. Before Judge HALL.
Monroe Superior Court. August Term, 1873.

For the facts of this case, see the decision.

A. D. HAMMOND; LANIER & ANDERSON; POE & HALL,
by R. H. CLARK, for plaintiffs in error.

PEEPLS & STEWART; A. M. SPEER, for defendants.

WARNER, Chief Justice.

The only question made in this case, before this Court, was as to the power and authority of the executors of Edmund Jackson to make sale of his lands and other property in a different manner than prescribed by law. The bill alleges that the land and other property of the testator was sold by the executors, on the plantation of the deceased, remote from the Court-house, and was illegal as against the rights and interests of the complainants, who were infants at the time, with a prayer to have said sale set aside. A motion was made to dismiss the bill for want of equity, which was overruled, and the defendants excepted.

The seventh item of the testator's will contains the following words: "I desire all my lands to be sold, together with the household and kitchen furniture not disposed of in this will, and such other property as I may die seized and possessed of, upon such terms, as to notice or credit, as my executors may, in their sound discretion, deem best." When the will does not otherwise direct, the general law applicable to executors' and administrators' sales must be complied with. If, however, a will authorizes a private sale by the executor, an administrator, with the will annexed, may execute the power and sell the property without an order from the Ordinary. If the will merely designates the property to be sold, without

specifying the mode of sale, no application for leave to sell is necessary ; but in other respects the executor or administrator with the will annexed, must comply with the requisitions before specified : New Code, 2567. The testator in this case, by his will, directed his land and other property to be sold, not at private sale but upon such terms, as to notice or credit, as his executors, in their sound discretion, might deem best. The executors had the power to sell the land and other property under the will without an order from the Ordinary, either for cash or credit, and upon such notice as they, in their sound discretion, might deem best, but in all other respects they were bound to comply with the law regulating the sale of their testator's property. When the intention of the testator is doubtful as to the mode of sale, the safe rule is to adhere to the law. To take the case out of the general rule of the law as to executors' sales, the intention of the testator should be plainly and distinctly expressed in the words of the power given to the executors by the will. There can be no pretence in this case that the executors were authorized to sell the testator's property under his will at *private* sale. All that can be claimed under the power contained in the will is, that in making a public sale of the property as required by law, they had a discretion as to the notice to be given thereof, and as to whether the property should be sold for cash or on credit, and what credit, if any. We express no opinion in regard to the statute of limitations, but leave that as an open question to be heard and decided on the final trial of the case, as well as the other questions made in the record. There was no error in overruling the defendants' motion to dismiss the complainants' bill.

Let the judgment of the Court below be affirmed.

WESLEY REID, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. When one juror, on a trial of an indictment for a felony, has been sworn, and a *nolle prosequi* is then entered, and a new bill found, it is not error that the array, with the same juror upon it, is put upon the prisoner; and in such a case the right of challenge, both on the part of the State and the prisoner, is the same as if the former proceedings had not been taken.
 2. On a trial for murder, the Court charged the jury, among other things, that "malice is presumed from the killing, and you should find the defendant guilty, unless he has shown by proof, such facts and circumstances as will make the killing justifiable, or reduce it to manslaughter." The defendant introduced no witnesses and relied on the evidence for the prosecution for his defense. The verdict was for manslaughter:
- Held*, That the verdict showed that the jury were not misled by the charge, as to the right of the defendant to claim an acquittal, or a verdict for a less offense than murder, if the evidence which was before the jury authorized it.
3. The fact that a husband has been told that indecent proposals have been made to his wife, is not, in law, a *justification* for slaying the person who is charged with having made them.
 4. The evidence is sufficient to authorize the verdict, and, under the rule so often announced, prevents this Court from holding that there was an abuse of discretion by the Judge who tried the case, in refusing a new trial.

Criminal law. Jury. Evidence. New trial. Before Judge HALL. Pike Superior Court. April Adjourned Term, 1873.

Wesley Reid was placed on trial for the offense of murder, alleged to have been committed upon the person of one Amos Martin, on December 25th, 1872. The defendant pleaded not guilty. After the array had been put upon the defendant and one juror selected, the Solicitor General, on account of a defect therein, entered a *nolle prosequi* on the indictment, the defendant neither consenting nor objecting. On the next day the defendant was again arraigned on a new indictment, and pleaded not guilty. When the array was put upon him, embracing the same juror who had been sworn on the previous day, he challenged the array because it was composed of the

same jurors who had been put upon him under the first indictment. The challenge was overruled, and the defendant excepted.

The evidence for the State made, in substance, the following case: The defendant, his family, George Black and his wife occupied the same house. On December 25th, 1872, the deceased came to this house and asked George Black and his wife where defendant was. They replied that he had gone across the river with his wife. When defendant returned, deceased was in the house. He pushed up against defendant, who said to him, "Let me into the fire, as I am wet and cold." Defendant stood before the fire, dried his gun, and was about to place it on the rack when deceased caught hold of it. Defendant told him to let loose. He replied that he would not. After some scuffling, and a threat from the defendant that he would knock him down, the deceased let go. The deceased then walked out of the house, and had gone some twenty yards when defendant said to his little girl, "Lucy, here is a bird," handing to her a bird which he had killed. Deceased turned and asked defendant what he said. He replied, "Go along, Amos, I am not talking to you, but to folks." Deceased said, "I am as good a little man as walks in Pike county." Defendant said that he did not like for a man to come to his house and banter him out. Deceased replied that he would rather fight to-day than run a foot race. Defendant asked him if he meant what he said. He replied that he did. Defendant started towards him, when he retired two or three feet and picked up an axe. Defendant said "all right," returned to the house, got his gun, cocked one barrel and started towards the door, when George Black's wife closed it and shoved him back. Defendant told her to let him out. She said she would not. He then went out of the back door. Black's wife told deceased to come in, or defendant would kill him. He replied that he would not; that he would go to defendant if he was "as big a nigger as hell." Defendant went around the house, fired at deceased twice, and then knocked him down with the butt of the gun. It was about two min-

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utes before deceased could speak ; he then turned on his right side and said, " West, I did not go to cut you with the axe." Defendant took up the axe and again started towards deceased, when George Black caught him and said, " For God's sake stop, as you have done too much already." Most of the shot struck deceased on the right side, below the collar-bone ; some few scattered and penetrated different portions of his body. He died from the effects of his wounds. A negro was present by the name of Bob Parks at the commencement of the difficulty. The deceased proposed to Parks, in the presence of the defendant, to go across the river and frolic with the girls. Defendant's wife had told him three or four days before the homicide that deceased had offered her \$5 00 to let him come to see her as a sweetheart, and for her not to notice defendant. Deceased asked defendant where his wife was, and when he replied over the river, deceased proposed to Parks to go over there and frolic with the girls.

The defendant introduced no testimony, but relied upon the evidence for the State.

The jury found the defendant guilty of voluntary manslaughter. He moved for a new trial upon the following grounds, to-wit :

1st. Because the Court erred in overruling the aforesaid challenge to the array.

2d. Because the Court erred in charging the jury, among other things, that " malice is presumed from the killing, and you should find the defendant guilty, unless he has shown by proof, such facts and circumstances as will make the killing justifiable, or reduce it to manslaughter."

3d. Because the Court erred in charging the jury as follows : " But before the killing can be justifiable on this ground (the seduction of defendant's wife) it must appear from the evidence, that to prevent the seduction of his wife the killing was absolutely necessary, and that the killing proceeded from no other cause than a desire to save his wife from seduction. Notwithstanding the prisoner may have had knowledge of the fact that his wife had been seduced by the deceased, or

that efforts were then being made by deceased to seduce her, still, if prisoner attacked and took the life of deceased for any other cause, or they naturally fought for any other cause, and prisoner killed deceased, he is not then protected on the ground that he was protecting the virtue of his wife."

4th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and defendant excepted.

BOYNTON & DISMUKE; DOYAL & NUNNALLY, for plaintiff in error.

T. B. CABANESS, Solicitor General, by PEEPLES & HOWELL, for the State.

TRIPPE, Judge.

1. The objection is not that the Court permitted a *nolle prosequi* to be entered, but that one juror having been sworn before this was done, the same panel with that juror was again put upon the defendant, after the finding of a new bill. We can see no possible hurt to the defendant in this. He had expressed himself content with this juror and had chosen him. He was only given a second opportunity to pass upon him, and of this surely he could not complain. But the juror was challenged by the State, and the objection is, that as the defendant had indicated his willingness to accept him, the State thereby had an advantage, and from that notice made the challenge. The meaning of this is, that the defendant unfairly lost a juror whom he wished to try him, and whom he had once selected. But where was there any possible remedy for this? Was the *nolle prosequi* rightly entered? That is taken as granted, for no exception is made of it. Nor is the exception that the State was permitted to challenge the juror when he was again called, on the second proceeding, to select a jury. When the bill was disposed of by the *nolle prosequi*, all that had been done, as to the jury, fell with it,

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and the right of challenge, both as to the State and the defendant, was the same as if the former proceedings had not been taken. It does not appear that other jurors who had been challenged by either side were on the array, and no question of that sort arises. If the juror who had been once sworn had been left off the array, the defendant could have been in no better condition; indeed, in not as good. For if he wished to have that juror, and he was not on the panel, he could then have had no chance. As it was, he did have the chance, provided the State did not challenge, and if it did challenge, then the State was charged with it, and had one challenge less thereafter. This was no damage to the defendant, and he could not possibly have been relieved from the position, except by denying the right of the State to challenge under the circumstances. This he did not do.

2. The Court charged the jury that, "malice is presumed from the killing, and you should find the defendant guilty, unless he has shown by proof such facts and circumstances as will make the killing justifiable or reduce it to manslaughter." The objection to this charge is, that as the defendant introduced no evidence, it denied him the benefit of such facts and circumstances as were proven by the State's witnesses; that it limited him to what he must prove by witnesses introduced by himself. Had the jury found a verdict for murder, there would have been force in the objection that the jury might have been misled by the charge. But, as stated by the Judge, in passing on the motion for a new trial, "although the charge was not strictly correct, the verdict shows that the jury did not put upon it the construction claimed by prisoner's counsel. The fact that they found the defendant guilty of voluntary manslaughter is evidence that they construed the charge properly, to-wit: that when the killing is proved to have been done by the defendant, malice is presumed, and he should be found guilty of murder, unless the proof discloses such facts and circumstances as will reduce the killing from murder to manslaughter, or show it to be justifiable." We think the

Judge is correct in this, and that the jury was not misled by the charge.

3. The exceptions made to the charge, on the ground that there was error in it as to the matter of the seduction, or attempted seduction of defendant's wife, might be disposed of by a general remark, to-wit: that the evidence did not call for any special charge on that subject, as made and complained of. Whether the Court was right or wrong, is immaterial in this case. There was no evidence whatever that the deceased had seduced defendant's wife, or that defendant killed him to prevent the seduction. Not one word passed between them about it at the time of the killing. A quarrel had arisen between them, and was being carried on furiously, when defendant shot deceased, but nothing was said by defendant, or any one else, as to an outrage or insult to his wife. One of the witnesses says, "a few days before, defendant's wife told him (defendant) that deceased had offered her \$5 00 to let him come to see her as a sweetheart." But if this was so, it did not seem to produce much effect on the defendant. He came into the house where deceased was, was friendly, dried his gun and put it up, and, though deceased was acting very provokingly, did not get "mad" until after deceased had gone out of the house, and a quarrel arising, dared the defendant out. It was not until then that the defendant became enraged, and the fatal rencontre took place. The evidence does not show that the virtue of the wife, or her attempted seduction, or what she may have said to the defendant, had anything to do with the killing. It would be going very far for it to be laid down as a rule of law that a man who has been told that improper proposals have been made to his wife, has, therefore, the right to slay the person who is charged with having made them.

4. As to the exception that the verdict is against the evidence, etc., the Judge who tried the case, after a review of the whole matter, refused to interfere. Were it not for the fact that the deceased dropped his axe before the shooting, and that defendant seized it after he had shot down the deceased, for the purpose of using it on him, I will admit, for myself,

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that the appeal for a new trial would be very strong; but the Judge below having very strongly approved the verdict, we let it stand.

Judgment affirmed.

ZACHARIAH PEAK *et al.*, plaintiffs in error, *vs.* C. T. COGBORN, defendant in error.

Where possession of a horse was obtained by a fraudulent trick, a possessory warrant is the proper remedy to recover the same; and that the consent of the plaintiff in the warrant was obtained to such possession, under the circumstances of this case, will not justify the retention of the possession by the defendants.

Possessory warrant. Before Judge KNIGHT. Milton Superior Court. August Term, 1873.

For the facts of this case, see the decision.

H. L. PATTERSON, for plaintiffs in error.

G. M. HOOK, by W. P. PRICE, for defendant.

WARNER, Chief Justice.

It appears from the evidence in the record that Cogborn had swapped a mule for a horse with Peak, that the mule was levied on to satisfy an execution against a third party who previously owned the mule. Peak called Cogborn out of his father's field and said to him that Smith, the bailiff, had levied on the mule he got from him, and the bailiff told him that he must go and get the horse back that he had got from him. Cogborn asked Peak what he would do if he gave his horse up. Peak told him he only wanted to change for a day or two, and then he, Cogborn, would get his horse back. Cogborn then went to the house, where he found Lindsay Peak and Tucker, who told him the same thing. Cogborn then got his bridle, put it on the horse, and delivered him to Zacha-

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riah Peak with this understanding. Cook testified that he came up about the time Peak was leaving with the horse; that Cogborn told him that if he was going to plow the horse any before he brought him back, to come over and get his plow-gear, as he did not want the horse's shoulders hurt. Peak did not return the horse, and Cogborn sued out a possessory warrant to recover the possession of him. On the trial of the possessory warrant before the Justice, a motion was made to dismiss it, which was overruled, and after hearing the evidence the Justice awarded the possession of the horse to Cogburn. Peak sued out a writ of *certiorari* to the Superior Court, on the hearing of which the Court dismissed the same; whereupon the plaintiff in *certiorari* excepted. In our judgment there was no error in dismissing the *certiorari* and affirming the decision of the Justice. The statute declares that when a personal chattel has been taken or carried away from the possession of the party complaining, by fraud, violence, seduction, or *other means*, without lawful warrant or authority, it shall be restored to the party from whose possession it was so fraudulently taken. It is quite apparent, from the evidence in this case, that the plaintiff in *certiorari* obtained the possession of the horse by a *fraudulent trick*, which the law will not sanction, and the consent of the defendant, under the facts of the case, will not justify him in retaining that possession.

Let the judgment of the Court below be affirmed.

HINES & HOBBS, plaintiffs in error, vs. THE BRUNSWICK
AND ALBANY RAILROAD COMPANY *et al.*, defendants in
error.

Under the facts in the record, the decision of the Judge to whom the whole matter was submitted, refusing the compensation asked for, was not contrary to law, and there was no error in overruling the motion for a new trial.

Hines & Hobbs *vs.* Brunswick and Albany Railroad Company *et al.*

New trial. Before Judge SCHLEY. Glynn Superior Court. November Term, 1873.

For the facts of this case, see the decision.

R. H. CLARK, for plaintiffs in error.

O. A. LOCHRANE; A. O. BACON; J. C. NICHOLS; McLAWS & GANAHL, for defendants.

TRIPPE, Judge.

Plaintiffs in error, as counsel for several creditors of the Brunswick and Albany Railroad, filed a bill to enjoin the sale of the road and its appurtenances, which had been levied on in detached portions by divers executions against the road. They were also counsel for the State of Georgia, who was also a party complainant to the bill, for the purpose of protecting whatever interest the State might have, arising out of the indorsement of certain bonds of the railroad company. Associated with them, as solicitors for the State, were several other attorneys. The railroad company was also a party complainant in obtaining the injunction. The State was finally dismissed from the bill, and all the creditors were made parties, including the first mortgage bondholders. The road was sold under a decree of Court, and by agreement of parties, several of the creditors, amongst whom were the clients of plaintiffs in error, were allowed to receive a considerable portion of the money arising from the sale, nearly \$40,000 00 of which went into the hands of plaintiffs in error, as the share going to their clients. Messrs. Hines & Hobbs, plaintiffs in error, received their fees or commissions on this amount. The Court had also ordered \$500 00 to be paid to each plaintiffs in error, and to one associate counsel and to the solicitor for the road, for filing the bill. The State had paid to plaintiffs in error, and to several of the other counsel, about \$700 00 or \$800 00 each. The interests of the clients of Messrs. Hines & Hobbs conflicted with the claims of the first mortgage bondholders,

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and their right to be made parties to the bill, as creditors, was resisted by them, as well as their right to any share in the fund.

Messrs. Hines & Hobbs claim that they are entitled to compensation out of the whole fund, and in proportion to the whole amount thereof, for their services in filing the bill, and, as they claim, for bringing the fund into Court. The Court below refused to grant an order for further compensation. We cannot say that, under the facts of the case, the Court erred in so refusing. It would be going very far to say that the solicitor for one or two creditors who file a creditor's bill, no matter what is the amount of the claim they represent, or the fund that may be finally distributed, can not only contest the right of other creditors to a participation, but after a protracted litigation, joined in by all of the creditors, by which the fund is finally brought into Court for distribution, may assert that they are entitled to compensation out of the whole fund in proportion to its amount, and the amount of litigation that has grown out of the case. If this be so, a creditor who had a claim of \$500 00 or \$1,000 00, might procure counsel—file a creditor's bill, where the fund or property might be \$20,000 00 or \$50,000 00, and for the filing of that bill and obtaining an injunction or a receiver for the property, his counsel could set up a claim for services to be paid by all the other creditors, or out of the general fund, in proportion to the whole amount which might be distributed. It would scarcely be thought that an attorney representing a debt of \$1,000 00, who, in a claim case, had succeeded in condemning property worth \$10,000 00, could charge his fees as if representing a debt of \$10,000 00. In such a case, though other creditors may take the whole proceeds, the attorney is entitled to his fees out of the same, but surely they would be considered or rated somewhat with reference to the interest he represented, and not to be fixed solely by the whole amount that may be distributed amongst all the creditors. And the more especially would this be true if the attorneys for the other creditors joined with him in prosecuting the case to a condem-

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nation of the property. The object of the rule which allows compensation out of the fund recovered to the counsel of the moving creditor, is to prevent the injustice there would be in such creditor having to pay for the action of which, though instituted by him, others were beneficiaries. It is to relieve him of the liability to the counsel whose services he procured, and which may have been of no avail to him though they were to others. In such a case the fund realized should protect him against the payment of such compensation as he was liable for. Under the facts in this case, we cannot say that the Judge to whom the whole matter was referred, a jury being waived, made such a decision as that it was error for him afterwards to refuse to set it aside and grant a new trial.

Judgment affirmed.

50	566
129	515

JOHN DOE *ex dem.* MARCILLA MILLER *et al.*, plaintiffs in error, *vs.* RICHARD ROE, *casual ejector*, and MONROE DEFOOR, tenant in possession, defendants in error.

1. Where evidence was admitted in the Court below without objection, exception thereto will not be heard in this Court.
- 2 Where a lot of land was set apart for the twelve months' support of the family of deceased, was sold under the order of the Ordinary, and the proceeds thereof applied to such support, the heirs-at-law cannot recover the same on account of want of authority in the Ordinary to direct such rule.

Bill of exceptions. Practice in the Supreme Court. Evidence. Distribution. Year's support. Court of Ordinary. Before Judge KNIGHT. Gilmer Superior Court. May Term, 1873.

For the facts of this case, see the decision.

R. H. FOOTE, for plaintiffs in error.

THOMAS F. GREER; C. D. PHILLIPS, for defendants.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendant, to recover the possession of lot of land number two hundred and ninety in the twenty-fifth district of Gilmer county. On the trial of the case, the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds therein set forth, which was overruled by the Court, and the plaintiff excepted. The lessors of the plaintiff were the heirs-at-law of Alfred Miller, deceased.

It appears from the evidence in the record that the lot of land was set apart by appraisers appointed by the Ordinary as a twelve months' support for the widow and children of Miller, the decedent, and, by an order of the Ordinary, was sold for that purpose at public sale, and purchased by the defendant, the widow making to him a deed therefor in pursuance of said order of the Ordinary.

1. The evidence offered at the trial of the appraisement and setting apart the land for the twelve months' support of the widow and children, and the order for the sale of the land for that purpose, was parol evidence, which was admitted without objection, therefore we are bound to presume that all the proceedings were regular, and the plaintiff cannot raise objections here to the regularity of the proceedings, which were not made in the Court below.

2. The plaintiff, however, insists that, inasmuch as the title to the land vested in his lessors, as the heirs-at-law of Alfred Miller, that title could not be divested by the proceedings heretofore mentioned for the purpose of obtaining the twelve months' support for the widow and children. The appraisers appointed by the Ordinary may assign to the widow and children, for their twelve months' support, a sufficiency, either in money or *property*: Code, section 2571. It is true there is no express power conferred on the Ordinary to order a sale of the property for that purpose, but Courts of Ordinary have general jurisdiction and authority in relation to the sale and

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disposition of the real property belonging to, and the distribution of, deceased person's estates: Code, section 331. The proven value of this lot of land is \$300 00. If the proceeds of the lot of land have been applied to the twelve months' support of the widow and children, (and there is no evidence in the record that it was not so applied,) it would be inequitable and unjust for the children, as the heirs-at-law of the decedent, after enjoying the benefit thereof, to recover the land from the sale of which their twelve months' support was realized, and of which they have had the benefit. On the statement of facts disclosed by the record in this case, there was no error in overruling the motion for a new trial.

Let the judgment of the Court below be affirmed.

EDWARD BROUGHTON, plaintiff in error, *vs.* JOHN P. THORNTON, administrator, defendant in error.

1. A tenant occupied a store-room from September, 1870, to December, 1871. In September, 1870, it was agreed between him and the landlord that he, the tenant, should have the store repaired, and the cost thereof should be deducted from the rent, and the repairs were then made. In December, 1870, he gave the landlord his note, expressing therein that it was for the rent of the store-room he then occupied, to be paid quarterly. The Court was requested by defendant to charge the jury, that the agreement as to the repairs rebutted the presumption of law that the giving of a note was evidence that there had been a settlement of accounts:

Held, That the refusal of the Court so to charge was not error.

2. The evidence does not sufficiently show that the damages were caused by the leaking of the store during the year 1871, to authorize this Court to grant a new trial, because the jury did not allow for them in the verdict.

Landlord and tenant. Presumption. Promissory notes. New trial. Troup Superior Court. May Term, 1873.

Thomas J. Thornton brought complaint against Edward Broughton on the following note:

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"\$150 00.

LAGRANGE, December 4th, 1870.

"I promise to pay Thomas J. Thornton one hundred and fifty dollars for the rent of the store-room I now occupy of his, to be paid quarterly.

(Signed)

"EDWARD BROUGHTON."

Pending the litigation, the plaintiff died, and his administrator, John P. Thornton, was made a party in his stead.

The defendant pleaded as follows:

1st. The general issue.

2d. That the consideration for which the note sued on was given has partially failed, in this that the plaintiff contracted to put the store-room rented by defendant in proper repair for the protection and sale of goods, which he has wholly failed to do.

3d. That the plaintiff was indebted to him, before the commencement of this suit, in the sum of \$230 50, a portion of which amount was paid out at the request of the plaintiff for repairs on said store-room, and which he agreed should be taken out of said rent; that the balance is due for damage done to the goods of said defendant on account of the plaintiff's failure to make the repairs in accordance with his contract; that defendant prays judgment for the surplus over and above plaintiff's claim.

To this last plea was attached a bill of particulars for money expended on the store-room during the months of September, October and December, 1870, aggregating \$138 50—all of which, with the exception of \$14 00, as far as can be judged from the character of the items, was for improvements and additions, such as counters, shelving, etc. The remaining items are for damages to various articles of merchandise. These are without date.

The evidence presented the following facts: Under the contract between the plaintiff's intestate and defendant, the latter was to have shelves, counters and a partition erected in the store-house, and the cost thereof was to be deducted from the rent. The roof was in a bad condition. This was to be

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repaired by the plaintiff's intestate. All repairs on the inside of the house, such as plastering, etc., was to be paid for by defendant, and to be deducted from the rent. All that was incumbent upon the defendant to have done, was performed, and his account in this particular was shown to be substantially correct. The damages to his goods, without fixing any particular date when sustained, were shown to have been about \$70 00. The leaking occurred in the winter of 1870 and 1871. There was no testimony showing definitely any damage to have occurred after the date of the note sued on. The contract between the plaintiff's intestate and the defendant for the renting of the store, was made in September, 1870. The larger portion of the work for which plaintiff paid, was proven to have been done in the same month in which the said contract was made, and to have been worth \$134 00, though the plaintiff only paid \$120 00 for it.

The defendant requested the Court to charge, "that if the they believed from the evidence that the plaintiff's intestate authorized the defendant to put the improvements, to-wit: counters, shelves, plastering and partition, in the store room, and that the amount of the cost was to be deducted from the rent, then the presumption in favor of the plaintiff that the giving of the note was a settlement of all accounts between them, would be rebutted."

The Court refused so to charge, and defendant excepted.

The jury found for the plaintiff \$150 00, with interest. The defendant moved for a new trial, because the verdict was contrary to the evidence and the law, and because the Court refused to charge as requested.

The motion was overruled, and defendant excepted.

MABRY, TOOLE & SON, for plaintiff in error.

W. W. TURNER, for defendant.

TRIPPE, Judge.

1. The tenant occupied the store-house from September, 1870, through the balance of that year, and 1871. In Sep-

tember, 1870, it was agreed between him and the landlord that he, the tenant, should have certain repairs done, the cost of which should come but of the rent. The repairs were immediately made, and four months thereafter, in December, 1870, the tenant gave the landlord his note, stating in it that it was for the rent of the store-house he then occupied, and was to be paid quarterly. When sued on this note, the tenant pleaded as a set-off the amount he had paid for repairs. On the trial, the Court was requested to charge the jury, that the agreement as to the repairs rebutted the presumption of law that the giving of a note was evidence that there had been a settlement of accounts. We do not see why the defendant below was entitled to this charge. In *Baldwin vs. Walden*, 30 *Georgia*, 829, it was held that a credit on a note, put there by the maker, is presumptive evidence that there was no account due by the holder to the maker. As early as in the case of *Mills vs. Mercer and wife*, *Dudley's Reports*, 158, the same principle was held, to-wit: that the execution of a promissory note is evidence, in law, of a full settlement of all accounts up to the date thereof, except such as are specially excepted at the time. Of course, proof to rebut this presumption is admissible. Does the fact that, four months before the note sued on was given, a contract was made between the tenant and the landlord, as above stated, take this note out of the rule, as to the presumption in such cases generally? Does not the fact that the agreement was, that the rent was to be reduced by the cost of the repairs, strengthen the presumption that the tenant would not have given his note when, at the same time, he held an account *against the rent* which was to lessen it to the amount of that cost? There was also the rent from September to December to be accounted for. We do not think there was error in the refusal of the Court so to charge.

2. As to the damages caused by the leaking of the roof of the store-house, it does not sufficiently appear that they occurred during 1871, so as to demand that the verdict be set aside, on the ground that the jury did not deduct them from

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the amount of the note. The testimony very strongly suggests that this damage was done before the note was given, and if so, the same question arises on this point as to the claim for the damages, if any, having been adjusted between the parties before the note was given, as arose in reference to the presumption of payment of the account for repairs. After the death of a creditor, it is but justice that his estate shall have all the presumptions in his favor which are allowed by the law fairly enforced.

Judgment affirmed.

VIRGINIA J. SIMS *et al.*, plaintiffs in error, *vs.* CHARLES L. SIMS, executor, *et al.*, defendants in error.

A bill in equity must show that the defendant, against whom substantial relief is prayed, is a resident of the county in which it is filed, otherwise the Court has no jurisdiction.

Equity. Jurisdiction. Venue. Before Judge BUCHANAN.
Troup Superior Court. May Term, 1873.

For the facts of this case, see the decision.

B. H. BIGHAM, for plaintiffs in error.

T. H. WHITAKER; FERRELL, LONGLEY & DOZIER, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants, in the county of Troup, praying for relief and an injunction. It is alleged in complainants' bill that Roberts, against whom the relief is prayed, is of Cobb county, but does not allege that he resides in that county. There is no allegation that Sims, the other defendant, resides in the county of Troup, in which the suit was commenced, or that he is of

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that county. The only mention made in the complainants' bill, as to his residence, is in the prayer for subpoena, in which the complainants pray that said Charles T. Sims, as executor of Wiley H. Sims, "of said county," be required to appear, etc.; but whether that refers to Troup county or to Cobb county, it is not apparent, as both counties are mentioned in the preceding part of the bill. There was a general demurrer to the bill for want of jurisdiction of the Court in Troup county, which demurrer was sustained, and the complainants excepted. Assuming that the allegations in the complainants' bill are sufficient as to the residence of Charles T. Sims, the executor, in Troup county, so as to give to the Superior Court of that county jurisdiction as to him, still, there is no allegation in the bill as to the acts and conduct of Wiley H. Sims, his testator, which would authorize the Court to decree any substantial relief against Charles T. Sims, his executor. The case made by the bill is against Roberts, and the substantial relief prayed on the allegations contained therein, is against him who resides in Cobb county, and there was no error in sustaining the demurrer to the jurisdiction of the Superior Court of Troup county as to him, in view of the allegations contained in the complainants' bill.

Let the judgment of the Court below be affirmed.

DOMESTIC SEWING MACHINE COMPANY, plaintiff in error,
vs. GEORGE W. WATTERS, defendant in error.

An inn-keeper has no lien on the goods in possession of his guest, as against the true owner, unless there be charges upon the specific article on which the lien is claimed.

Certiorari. Inn-keeper's lien. Before Judge UNDERWOOD.
Floyd county. At Chambers. September 12, 1873.

Watters foreclosed an inn-keeper's lien for \$40 50 against Henry Reynolds and had it levied upon a sewing machine.

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A claim was interposed by the Domestic Sewing Machine Company. Upon the trial of the issue thus formed, it appeared that the amount claimed was due by the defendant for board; that he had the machine, which was levied on, in his possession in the house of the plaintiff while boarding with him; that it was retained by the plaintiff under his lien when defendant left his house, but that the possession thereof was recovered by the claimant by possessory warrant; that defendant never had any title to nor interest in said machine.

The magistrate held the property subject. A petition for the writ of *certiorari* was filed, but the Judge refused his sanction, whereupon claimant excepted.

HAMILTON YANCEY, by brief, for plaintiff in error.

MITCHELL & GLENN, by WRIGHT & FEATHERSTON, for defendant.

TRIPPE, Judge.

The petition for *certiorari* alleges that the Justice of the Peace decided that notwithstanding the property levied on belonged to the claimant, and the defendant in *fi. fa.* had no title or interest in it, still the lien of the landlord for his whole bill must first be discharged before the claimant can recover the property. This is equivalent to holding that although the property in possession of a guest belongs to a third person, a landlord has a lien on it for the *board* of the guest. Not that the charges that may be on the property itself for keeping it, etc., must be paid, but be the property what it may, whether there are any costs or charges for keeping, storing or feeding it or not, the debt for the guest's board is a lien on it, no matter to whom it may belong, superior to the right or title of the true owner. Section 2122 of the Code says, the landlord's lien attaches though the guest has no title, or even stole the property, and the true owner must pay the *charges upon that specific article* before receiving the same. In *Colquitt & Baggs vs. Kirkman*, 47 Georgia, 555, the true construction

is put upon this section. That was the case of the lien of a livery stable keeper.

By section 2124, the keeper of a livery stable is entitled to the same lien as an inn-keeper, and in the case referred to, it was held, that whilst as against the actual bailor, a livery stable keeper has a lien upon an article of property deposited with him for feed or storage, for his whole account against the depositor in the line of the livery stable business, yet, if the depositor be not the true owner of the particular article in question, or if there be a prior legal incumbrance upon it, the lien of the stable keeper is only good against the true owner or prior incumbrancer for the *expense of feeding or taking care of that particular article*. This shows the true limit, both on the lien of the livery man and the inn-keeper. As the application for a *certiorari* charges that the Justice of the Peace held directly in conflict with this, viz.: that although the sewing machine belonged to claimant, yet the inn-keeper had a lien upon it for the board of his guest who had it in possession. We think the *certiorari* should have been granted, and all the facts inquired into and passed upon, to-wit: whether the guest had such a right to or interest in the machine as to make it liable to the lien of the inn-keeper.

Judgment reversed.

JOSEPH E. RUSSELL, plaintiff in error, vs. THE FREEDMAN'S SAVINGS BANK OF MACON, defendant in error.

When the garnishee failed to answer through a mistake as to his legal duty, and judgment was rendered against him for a much larger sum than he had in hand, the discretion of the Court in setting aside the same, on motion made during the term, will not be controlled.

Garnishment. Practice in the Superior Court. Before Judge HILL. Bibb Superior Court. April Term, 1873.

Joseph E. Russell brought case against John R. Johnson for \$300 00 damages, and served a summons of garnishment

Russell vs. The Freedman's Savings Bank of Macon.

upon the Freedman's Savings Bank of Macon. At the April term, 1873, the plaintiff obtained judgment against the defendant for the amount sued for. Subsequently, no answer having been filed, judgment was rendered against the garnishee. During the same term, the garnishee moved to vacate said judgment, upon the following statement of facts:

In May, 1872, the defendant, Johnson, had deposited in said bank \$50 00. He was then under indictment for several felonies. Judge Cole, the then presiding Judge of the Circuit, having been informed of these facts, ordered said bank not to pay to said defendant, or to his order, any portion of said fund. On the day preceding the service of said summons of garnishment, the sheriff of Bibb county levied on said sum of money. The garnishee supposed that the order from the Judge and the levy by the sheriff was a final disposition of said fund, and, therefore, failed to answer. It now has the \$50 00, and is ready to pay it as the Court may direct.

The Court set aside said judgment, and plaintiff excepted.

J. RUTHERFORD, for plaintiff in error.

R. F. LYON; JACKSON, NISBET & BACON, for defendant.

WARNER, Chief Justice.

This was a motion to set aside a judgment against a garnishee who had failed to answer. The motion to set aside the judgment was made during the same term of the Court at which it was rendered. The Court, after hearing and considering the evidence in support of the motion to set aside the judgment, passed an order setting it aside, and the plaintiff excepted. The general rule undoubtedly is, that the Courts will not set aside a judgment against a garnishee who fails to answer, unless some good and satisfactory reason be shown therefor, to be judged of by the Court. In looking through the evidence in the record in this case, it is quite evident that the garnishee acted under a mistake as to his legal duty, and not in bad faith, and as his showing was satisfactory to the

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Court which heard it, and the motion to set aside having been made during the term of the Court at which the judgment was rendered, we cannot say that the Court so abused its discretion in setting aside the judgment as will authorize this Court to control it, the more especially when it appears from the record that the plaintiff obtained a judgment against the garnishee for \$300 00, when he had only \$50 00 in his hands belonging to the defendant.

Let the judgment of the Court below be affirmed.

ALEXANDER ATKINSON, plaintiff in error, *vs.* DANIEL KEITH, administrator, *et al.*, defendants in error.

1. A creditor of an insolvent estate, who held the vendor's lien on land which had been sold by the administrator, may proceed by bill against the representative of the estate for the assertion of his equitable claim on the proceeds of the sale.
2. The creditor's debt was contracted in 1859, and the bill was filed in 1869, originally against the administrator, the purchaser and his vendor, and the widow of the intestate who had taken dower, charging notice of the lien on each, and praying a sale of the land for the discharge of the vendor's lien. By amendments made after January 1st, 1870, all parties defendants were stricken from the bill, except the administrator and the first purchaser, who, it was charged, had not paid for the land. The prayer was also amended, asking judgment on the debt against the administrator, and that the purchaser be decreed to pay his debt due the estate to complainant, and praying an injunction restraining the collection of the debt due by the purchaser:
Held, That no necessity was shown why the purchaser should be a party, or for the relief prayed against him, or for any injunction, and the bill should have been dismissed as to the purchaser.
3. The amendment to the prayer was a proper amendment, and the bill was not, on account thereof, demurrable, on the ground that the relief then prayed was barred by the Act of March 16th, 1869.

Equity. Vendor's lien. Parties. Amendment. Statute of limitations. Before Judge UNDERWOOD. Meriwether Superior Court. November Term, 1873.

Atkinson vs. Keith et al.

Alexander Atkinson filed his bill on December 29th, 1869, against Daniel Keith, as administrator upon the estate of George W. Keith, deceased, David B. Moore, Benjamin Elliot and M. L. Duskin, and his wife, Martha J. Duskin, making, substantially, the following case :

On October 17th, 1859, complainant and one John W. Hunter conveyed certain lands, which they jointly owned in Stewart county, to George W. Keith, at and for the sum of \$3,700 00. Keith paid a portion of the purchase money in cash, and gave notes for the balance. These notes were divided between Hunter and complainant, the latter receiving two, each for the sum of \$550 00, and due December 25th, 1860. George W. Keith died, and the defendant, Daniel Keith, became his administrator. Complainant always relied upon his vendor's lien as security for the payment of said notes, and so notified said administrator, and demanded payment. Notwithstanding this, said administrator sold said land to the defendant, David B. Moore, who purchased with full notice of complainant's claim. Moore sold said property to the defendant, Benjamin Elliot, who also purchased with full notice of complainant's lien. Dower was assigned in said land to Martha J. Keith, the widow of George W. Keith, now the wife of the defendant, M. L. Duskin. She and her husband also had full notice of complainant's lien. The estate of George W. Keith is insolvent, and complainant's only remedy is upon his equitable lien.

Prays a sale of the aforesaid lands, and that his claim may be satisfied from the proceeds thereof.

On March 30th, 1870, complainant amended his bill by charging that the defendant, Keith, as administrator, sold said lands to one Benjamin Perkins, who bought with full notice of complainant's lien, and that Perkins sold to Moore.

On September 13th, 1870, complainant amended by charging that it had recently come to his knowledge that said administrator had in his possession, and was suing upon, the note given by Moore for said lands, which note was dated November 3d, 1863, for the sum of \$3,005 00, and payable

to said administrator. Still relying upon his equitable lien, yet nevertheless prays that Moore may be decreed to satisfy his claim in part payment of said note, and that said administrator, in the meantime, be enjoined from making any collection thereon.

Upon motion of complainant, the bill was dismissed as to all the defendants except Moore and the administrator.

The remaining defendants demurred to the bill, upon the ground that the amendments rendered the bill multifarious, and upon the further ground "that the notes, which were the foundation of the amendments, were barred by the Act of the Legislature of March 16th, 1869, at the time of the filing thereof."

The demurrer was sustained, and complainant excepted.

BOYNTON & DISMUKE; A. M. SPEER, for plaintiff in error.

GEORGE L. PEAVY, by Z. D. HARRISON, for defendants.

TRIPPE, Judge.

1. All the parties to this bill, originally, or made so by amendment, were stricken from the case, except the administrator of G. W. Keith, the deceased debtor, and Moore, the purchaser of the land at administrator's sale. The bill is for the purpose of asserting complainant's equity on the proceeds of the sale. We have held that this can be done: See *Stallings, executor, vs. Ivey, administrator*, 49 Georgia, 274. The estate in this case is shown by the bill to be insolvent. There may be many reasons why complainant is entitled to go into equity. His lien is a creature of equity, and if he could even now assert it at law it could be done only by a proceeding as full and complete in setting forth his claim as a bill in chancery. Equity has not lost all jurisdiction because a party may proceed at law if he so choose.

2. There was no necessity why Moore, the purchaser of the land, should be made a party, or why he should be restrained

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from paying to the administrator the money he owes on the purchase. Courts will not interfere thus with the administration of an estate without good cause shown. We presume the idea for getting an injunction was, that that was the only way to subject the money in Moore's hands to the lien of complainant. It may as well be reached in the hands of the administrator as in any other way. Indeed, it is the only proper way, unless good reasons be shown why it should not go into his hands at all. There might be liens on the fund superior to complainant's, or rather claims against the estate that would have a priority over the vendor's lien: See *Stallings vs. Ivey, supra*.

3. The last amendment to the prayer asked a judgment against the administrator for complainant's debt. It is replied, by way of demurrer, that this prayer comes too late; that the Act of March 16, 1869, bars the relief now prayed. The original bill sets forth this debt, the complainant's right to it, and the bill was filed for its enforcement, and the administrator was a party. All the charges were in the bill at first, on which to found this prayer. It should have been in when the bill was filed. But it is not too late now to make it. The administrator had notice before 1870 that complainant was asserting his right to collect the debt. It is true it was sought to have the land resold. That did not deprive complainant to ask that the proceeds of the sale in the administrator's hands should be decreed to pay it. It is not introducing a new cause of action, nor an attempt to set up any claim barred by any statute of limitations.

Judgment reversed so far as the bill was dismissed against the administrator.

JOHN FRYER, plaintiff in error, vs. THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

The coroner has no vested right to hold an inquest over the bodies of persons found dead in his county, and to charge the county therefor, when the public laws of the State do not require such action.

Coroner. Inquest. Before Judge HALL. Henry Superior Court. October Term, 1873.

For the facts of this case, see the decision.

MCDANIEL & WHITFIELD, for plaintiff in error.

SPEER & STEWART, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff, as coroner of the county of Henry, against the defendant, to recover damages for removing the dead bodies of seven persons from the limits of said county, by means whereof he was prevented from holding an inquest over the dead bodies of said seven persons and receiving his lawful fees therefor, as such coroner. The defendant demurred to the plaintiff's declaration, which demurrer was sustained by the Court, and the plaintiff excepted.

The plaintiff alleges in his declaration that the seven persons found dead were supposed to have been killed by a collision of cars. It is not made the duty of the coroner to hold an inquest over the dead bodies of all persons who he may find dead in his county. To have authorized him to hold an inquest over the dead bodies of the persons mentioned in his declaration, and to charge the county the fees allowed him by law for doing so, he should have alleged such facts as to the manner of their death, or that they came to their death under such circumstances as would have authorized him, under the law, to have held an inquest over their dead bodies, and that the defendant unlawfully prevented him from doing so, and

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should have alleged such acts on its part as were unlawful. The 592 and 593d sections of the Code declare when an inquest shall not be necessary. For aught that appears on the face of the plaintiff's declaration, the dead persons mentioned therein were within the exceptions mentioned in those sections of the Code. The plaintiff had no vested right, as coroner, to hold an inquest over the dead bodies of the persons named, and to charge the county therefor, when the public laws of the State did not require him to do so, and until he alleges such a state of facts and circumstances as made it his duty, under the law, to have held an inquest, the defendant has done him no injury by removing the bodies, even if he could maintain an action against it for his fees, if it had removed the dead bodies illegally. If a prisoner was sentenced to be hung by the sheriff, and some one before the day of execution should unlawfully kill him, it would hardly be contended, we suppose, that the sheriff could maintain an action against the party who killed the prisoner, for depriving him of his fees which he would have received for executing him if he had not been killed.

Let the judgment of the Court below be affirmed.

SARAH KELLY, plaintiff in error, *vs.* HENRY P. BROOKS
et al., defendants in error.

This case comes within the decision in the case of *Alfred Prescott vs. M. G. Bennett et al.*, *ante*, 286, and as seven years had not expired since the judgment was obtained, which had been vacated and declared void by an order of Court on the ground that it was founded on a contract for the hire of a slave, and as the judgment was therefore not dormant at the time the motion was made to set aside and revoke such order, it was error in the Court to refuse the motion.

Constitutional law. Statute of limitations. Judgments.
Before Judge KIDDOO. Mitchell Superior Court. May
Term, 1873.

Sarah Kelly recovered a judgment against Henry P. Brooks and Moses Pullen for \$280 00, principal, besides interest and cost, in Mitchell Superior Court, on November 14th, 1866. At the November term, 1869, on motion of the defendant, the judgment was vacated, the order reciting that "it was obtained upon a contract for the hire of a negro slave previous to June, 1865," as the cause of such action. At the May term, 1873, a motion was made by the plaintiff to vacate said order. The motion was overruled, and plaintiff excepted.

J. J. BRADFORD; WILLIAM E. SMITH, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

In the case of *Prescott vs. Bennett et al.*, *ante*, 266, the motion to set aside the order vacating the judgment was made within three years from the time the order was granted, and also before the judgment which was set aside was dormant. In the opinion pronounced by WARNER, Chief Justice, in that case, there was no limitation as to time on the right of the movant to make the motion to set aside. See, also, his dissenting opinion in the case of *Tison vs. McAfee*, *ante*, 279. My own opinions in both of those cases were, that there was a limitation to this right, and that the motion must be made within one of two periods—either within three years, in analogy to the time required for filing a bill for a new trial, or within that period in which the right, or the right of action growing out of the matter which is *sub judice*, would be barred or become dormant by the statute of limitations. In neither of those cases was it necessary to determine which of the two rules was the proper one, as under either rule the same judgment would have been rendered. But it was very clearly indicated, so far as concerned my own opinion, that the last rule stated should govern, and the reasons for that opinion were given in each case.

Whittington vs. Colbert.

In this case, the motion to set aside the vacating order was not made until after the expiration of three years from the time it was granted, but was made before the judgment, which had been declared vacated, had become dormant. This brought the motion within the proper period, and it should have been granted.

I refer to the two cases cited for the reasons which, in my judgment, make the above rule the right one for construing sections 3587, 3588 and 3589 of the Code, and for ascertaining the proper meaning of the words, "a motion to set it aside (a judgment) may be made *at any time within the statute of limitations.*"

Judgment reversed.

CORNELIUS C. WHITTINGTON, plaintiff in error, vs. JOHN G. COLBERT, administrator, defendant in error.

Though a defendant has had set apart to him a homestead under the Act of 1868, which has failed as against debts contracted prior to July, 21st, 1868, on account of the unconstitutionality of said Act, he may, nevertheless, claim the homestead allowed under the Code.

Homestead. Before Judge HILL. Crawford Superior Court. September Term, 1873.

This case is reported in the decision.

THOMAS F. GREEN, by B. H. HILL & SON, for plaintiff in error.

POE & HALL, for defendant.

WARNER, Chief Justice.

This case came before the Court below on an affidavit of illegality, and the only question made was, whether the defendant in execution, who had obtained a homestead exemp-

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tion under the Act of 1868, as against debts created prior to the adoption of the Constitution of 1868, could claim an exemption of property from levy and sale as provided by the 204th section of the Code. The Court below held that he could not, and the defendant excepted. This case comes within the ruling of this Court, in *Lawrence vs. Evans*, decided at the last term, and must be controlled by it.

Let the judgment of the Court below be reversed.

THOMAS BIRD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. A defendant in a criminal case is not entitled to a copy of the indictment and a list of the witnesses sworn before the grand jury, except upon demand.
2. If no such demand is made, a special plea to the indictment, on the ground that the witnesses *whose names are indorsed on the bill* were not sworn before the grand jury, is demurrable.
3. Nor is it a good plea "that the witnesses upon whose testimony the bill was found, were not sworn *by or before the Court*."
4. Where such pleas are filed, with the further plea that the witnesses sworn before the grand jury did not have the proper oath administered, this latter plea should set forth the names of the witnesses thus alleged to be improperly sworn.
5. The Court has the power, on motion of the Solicitor General, before any evidence is introduced, to cause the defendant's witnesses to be sworn and separated.
6. If such direction be given by the Court, with notice to defendant that upon his failure or refusal to have his witnesses sworn and separated, they could not be afterwards sworn, and the defendant does so refuse, he is not entitled to have them sworn after the State has closed, except upon special cause shown, to be determined by the Court.
7. The omission by a defendant on a trial for felony to avail himself of the privilege allowed by statute to make a statement to the jury, is not a matter to be considered by them in determining defendant's guilt, and it is error for the Court to charge, "that the jury may take that fact into consideration, and to give to it such weight as they might see fit, with the other evidence, and if, upon the whole, they should believe him guilty, they should so find—otherwise, not."

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Criminal law. Practice. Indictment. Pleading. Witness. Charge of Court. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Thomas Bird was placed on trial for the offense of burglary, alleged to have been committed by breaking and entering the store-house of one R. G. Johnson, on September 13th, 1873. The defendant pleaded specially as follows:

1st. The names of the witnesses M. W. Murphy, Jim Roberts, F. J. Johnson and R. J. Johnson are the only ones indorsed on the indictment, and none of them testified before the grand jury which found the bill.

2d. The witnesses, upon whose evidence said indictment was found, were not sworn by or before this Court.

3d. If any oath was administered to said witnesses, it was not the oath prescribed by the Code.

Upon demurrer, said pleas were stricken, and defendant excepted.

The defendant then pleaded not guilty.

When the witnesses for the prosecution were sworn, the defendant moved to have them separated. The Court so directed. The Solicitor General moved that the same course be taken with the witnesses for the defense. The Court ordered that the defendant's witnesses come forward, be sworn and separated. Counsel for defendant stated that they did not know that they would have any witnesses. The Court stated that if they had any and did not then bring them forward, he would exclude them. None were produced or sworn. After the evidence for the prosecution was closed, the defendant offered two witnesses to prove an *alibi*. The Court inquired of his counsel if they knew of these witnesses when the ruling was made relative to their separate examination. Upon counsel replying in the affirmative, the witnesses were excluded, and defendant excepted.

The defendant failed to make a statement to the jury, as authorized by the statute. The Court, in this connection, charged the jury, that they "might take into consideration

the fact that defendant failed to make a statement and to give to that such weight as they might see fit, with the other evidence, and if, upon the whole, they should believe him guilty, they should so find—otherwise, not.” To this charge the defendant excepted.

The jury found the defendant guilty. Error is assigned upon each of the above grounds of exception.

REESE CRAWFORD; G. E. THOMAS, for plaintiff in error.

W. A. LITTLE, Solicitor General, by JAMES M. RUSSELL;
T. W. GRIMES; CHARLES COLEMAN, for the State.

TRIPPE, Judge.

1. In *Dean vs. The State*, 43 *Georgia*, 218, it was held that the constitutional provision, that defendants in criminal cases shall be furnished, *on demand*, with a copy of the accusation and a list of the witnesses on whose testimony the charge against him is founded, controls section 4634 of the Code upon this subject. This puts felonies and misdemeanors on the same footing as to the right to this copy and list, and makes section 4635 applicable to all grades of offenses.

2. This being so, if there be no demand made by the defendant, there is no necessity for putting the names of the witnesses on the indictment—at least, it necessarily follows that witnesses in such cases may have been sworn before the grand jury, whose names are not on the indictment. And a plea merely stating that the witnesses whose names are on the bill were not sworn before the grand jury, is demurrable. There is no law requiring the witnesses, on whose testimony the bill is found, to be sworn by or before the Court. Section 3918 of the Code gives the power to the foreman of the grand jury to administer the oath to all witnesses required to testify before them.

3 and 4. If the plea be that an improper oath was administered to the witnesses, it should state what witnesses were thus illegally sworn. Where no demand is made for a list of

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such witnesses as were sworn before the grand jury, and consequently no legal necessity of any record of such witnesses, a plea is too general, and not issuable, which merely states that if any oath of any kind was administered, it was not an oath in these words, (giving the form,) but was an oath to this effect: (giving the form of the oath alleged to have been administered.) The plea should set forth the name of the witness or witnesses, so that the issue can be made and the State put on notice. There is no difficulty in this. If the defendant demands and has a list of the witnesses, he can easily make the specifications; without this, there may be a dozen or more who were sworn and testified before the grand jury, and no notice given as to which of them, or how many, it is claimed were illegally sworn.

5. In *Meeks vs. The State*, decided at this term, it was held, that the Court has the power, on motion of the Solicitor General, before any evidence is introduced, to cause the defendant's witnesses to be sworn and separated. The same point was also presented, and the same holding made, though not reported, in *Ware vs. The State*, decided at the same term. When the Court gave this direction, counsel for defendant stated that they did not know they would have any witnesses. The Court gave notice that if they had any, and did not then bring them forward, he would exclude them. None were produced. After the State closed, two witnesses were offered by defendant to prove an *alibi*. The Court inquired of defendant's counsel whether they knew of these witnesses when the ruling was made relative to their separation, and on their replying in the affirmative, the Court excluded the witnesses.

6. If the Court was right in directing the separation of the witnesses, and we hold it was, what else could have been done than to exclude the witnesses under the circumstances? Notice was given by the Court of what the result would be by just such a course as counsel adopted. With this notice, is there any ground of complaint? What other penalty or forfeiture could have been imposed? It was said a fine might have been imposed. That would not have vindicated the rule of

law involved. The State has a right to have the witnesses for the defense separated. The reasons are obvious. The defendant has the same right. Either party would think it but poor compensation for the loss of an important right in a trial, to have the other party or the counsel fined. Courts should have summary power to enforce the rules of law in such cases, so that by their practical working they may be vindicated in all their integrity. If any right were lost, it was wilfully and defiantly thrown away.

7. The defendant did not make any statement to the jury on the trial, as by law he was permitted to do. The Court charged the jury that "they might take into consideration the fact that defendant failed to make a statement, and to give to that such weight as they might see fit with the other evidence, and if, upon the whole, they should believe him guilty, they should so find; otherwise not." Was this charge correct? Does it not directly imply that the failure of defendant to make a statement is, in law, some evidence against him, and that the failure may be considered by the jury, *with the other evidence*, to determine his guilt? We do not think that the statute giving this right to a defendant intended that it should be counted against him, if he did not avail himself of it. If so, it should be stricken from the statute book at once. Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief. It would be terrible if what a defendant said in his behalf could not practically count much for him, certainly not as other evidence—and yet a failure to say something should count as evidence against him, to be considered by the jury with "the other evidence." If this be so, the statute is a sword to pierce, where it was intended, whether wisely or not, as something of a shield.

With this charge, and looking at the evidence and the whole case, we think justice requires that a new trial be granted.

Johnson vs. Emanuel.

T. J. JOHNSON, plaintiff in error, vs. WILLIAM D. EMANUEL, defendant in error.

Prior to the Act of 1873, the landlord, in the absence of any contract to that effect, had no lien on the crops of the tenant for his rent, before the levy of a distress warrant therefor.

Landlord and tenant. Distress warrant. Lien. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

For the facts of this case, see the decision.

W. A. LITTLE; J. M. MATTHEWS, for plaintiff in error.

WILLIS & WILLIS, for defendant.

WARNER, Chief Justice.

This case came before the Court below on the trial of a claim to sixteen hundred pounds of seed cotton which had been levied on by virtue of a distress warrant, issued in favor of the plaintiff against Scott for rent, which was claimed by Emanuel. It appears from the evidence in the record that on the Saturday before the distress warrant was levied on the cotton, Scott had sold and delivered it to the claimant in payment for a horse. By the written contract between Scott and the plaintiff it is not stated therein that Scott was to pay a part of the crop made on the land for the rent of it, but that he shall pay \$25 00 for the use of a mule, and pay seventeen hundred pounds of good lint cotton. The Court charged the jury, in substance, that if Scott, the defendant, had sold the cotton to the claimant for a valuable consideration, and had delivered it to him before the distress warrant was levied thereon, it was not subject thereto, though it might defeat the plaintiff's claim for rent; to which charge the plaintiff excepted.

This distress warrant was issued prior to the Act of 1873. There was no contest as to liens in this case, and no contract that the plaintiff should have a lien on the cotton for his rent.

The landlord's lien for rent, under the contract in this case, had not attached to the cotton before the levy of his distress warrant thereon, so as to defeat the claimant's title to it under his purchase from Scott, prior to the levy of plaintiff's distress warrant. We find no error in the charge of the Court in view of the facts contained in the record.

Let the judgment of the Court below be affirmed.

WILLIAM FULFORD, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

An indictment against A for the offense of assault with intent to murder one J. A. Conway, charged the prisoner as principal in the second degree, in being present, aiding and abetting A "by pushing, striking, assaulting and threatening the said J. A. Conway."

Held, That such words thus descriptive of the acts of A, which constitute the offense of which he is accused, cannot, on motion of prosecuting counsel, without the consent of the prisoner, be stricken from the indictment as surplusage.

Criminal law. Indictment. Before Judge STROZER. Mitchell Superior Court. May Adjourned Term, 1873.

William Fulford was placed on trial upon an indictment for the offense of an assault with intent to commit murder, alleged to have been committed upon the person of J. A. Conway, on June 23d, 1873. The indictment contained also a count charging the defendant as a principal in the second degree, as follows:

"And the jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said H. B. Humphries, of the county and State aforesaid, with the offense of an assault with intent to murder, as principal in the first degree, and William Fulford and L. S. Shackelford, of the county and State aforesaid, as principal in the second degree, with the offense of assault with intent to murder. For that the said H. B. Humphries, on the

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twenty-third day of June, in the year eighteen hundred and seventy-three, in the county aforesaid, did then and there unlawfully, and with force of arms, in and upon one J. A. Conway, with a certain wooden stick of one and a half inches in diameter, and three feet long, of the value of one dollar, the same being a weapon likely to produce death, did make an assault with the intent then and there, the said J. A. Conway, then and there as aforesaid, wilfully, feloniously, and of malice aforethought, to kill and murder, and the said J. A. Conway then and there did beat, wound and ill-treat. And the jurors aforesaid, on their oaths aforesaid, do further say that William Fulford and L. S. Shackelford, in the county aforesaid, on the twenty-third day of June, in the year eighteen hundred and seventy-three, were present, aiding and abetting the said H. B. Humphries, (by pushing, striking, assaulting and threatening the said J. A. Conway,) the said offense of an assault with intent to murder aforesaid, in manner aforesaid, to do and commit, contrary to the law of said State," etc.

The defendant pleaded not guilty. After plea filed, and after the jurors had been put upon the prisoner, and after the Court had refused to require the Solicitor General to elect upon which count he would proceed, the Court, over the objection of defendant, allowed the indictment to be amended by striking from the second count the following words: "by pushing, striking, assaulting and threatening the said J. A. Conway," said words being embraced in () in the above copy of said count. To this ruling the defendant excepted.

The jury found the defendant guilty upon the second count and recommended him to the mercy of the Court.

He moved for a new trial upon numerous grounds, and amongst them on account of error in the ruling aforesaid.

The motion was overruled, and defendant excepted.

T. R. LYON; C. O. DAVIS, for plaintiff in error.

B. B. BOWER, Solicitor General, for the State.

TRIPPE, Judge.

The indictment in this case not only charged the defendant, as principal in the second degree, in being present, aiding and abetting the chief perpetrator of the alleged offense, but proceeded further and specified the acts whereby the aiding and abetting were done. The prosecuting counsel, on motion, struck these descriptive averments from the indictment, over the objection of defendant.

We recognize the rule that it is not necessary to prove allegations in an indictment which are immaterial or purely surplusage. But the question is, what are immaterial averments? Or, rather, when do averments which might have been omitted become material—or, at least, so enter into the indictment as framed that they cannot be stricken or rejected as surplusage? Starkie on Evidence, volume 3, page 1539, says it is a most general rule that no allegation *which is descriptive of the identity of that which is legally essential to the claim or charge*, can ever be rejected; and on page 1542, same volume, makes it more specific by restating the rule thus: "The position that descriptive averments cannot be rejected, extends to all allegations which *operate by way of description or limitation* of that which is material." Bishop says: "If the indictment sets out the offense *as done in a particular way*, the proof must show it so, or there will be a variance. And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other:" 1 Bishop's C. P., secs. 234, 235. If the prosecutor state the offense with unnecessary particularity, he will be bound by that statement, and must prove it as laid: *United States vs. Brown*, 3 McLean R., 233; *Rex vs. Dawlin*, 5 T. R., 311.

In the case in 3 McLean, the indictment charged the post-master with stealing a letter *containing certain bank notes*. It was held that the averment as to the bank notes might have

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been omitted and an offense was charged without those words, but being in, they must be proved. So in *United States vs. Porter*, 3 Day, 233, the charge was stopping the mail with an averment of a contract between the Postmaster General and the carrier. Though this averment was not necessary to the indictment, it was adjudged that it must be proved. In *The State vs. Copp*, 15 New Hampshire, 212, the defendant was indicted for resisting the sheriff *legally appointed and duly qualified*. Although the *appointment and qualification* might have been omitted, it was held that it was necessary to establish them by testimony. Where the statute made it penal to sell spirituous or intoxicating liquors, and the charge was the selling of spirituous *and* intoxicating, the prosecutor was bound to show the liquor to be both spirituous and intoxicating: 4 Gray, 18; see *Commonwealth vs. Varny*, 10 Cush., 402; *Commonwealth vs. Butcher*, 4 Grattan, 544; *United States vs. Keen*, 1 McLean, 429.

These decisions agree with the rule as quoted from Bishop and Starkie. The confusion that grows out of applying it may be avoided by observing the qualification of it or rather the statement of another rule given by Bishop, Chitty and Phillips. Chitty (1 Criminal Law, 294, 295,) says: if any unnecessary averments *disconnected with the circumstances which constitute the stated crime* be introduced, they need not be proved but may be rejected as surplusage. See, also, 1 Chancery Pleadings, 263. Bishop and Phillips state this rule to be, if the *entire averment* may be omitted of which the *descriptive matter is a part*, or can be rejected as surplusage, then the descriptive matter falls with it and need not be proved: Phillips' Evidence, (eighth edition,) 854; 1 Bishop Criminal Proceedings, section 235. Or, as it is put in 3 McLean, *supra*, if the averment be mere facts disconnected with the offense, they need not be proved. See, also, on this distinction in the rule, 15 New Hampshire, 212.

These authorities show the line between material and immaterial averments, and where those which might have been omitted when once introduced become an important part of

the indictment, and cannot be rejected as surplusage or stricken out, but must be proved. And there is reason and justice in the distinction. Take this case. It was not necessary that the pleader should have stated the acts of the defendant which constituted his "aiding and abetting," or to define how it was done. The "aiding and abetting" was an essential averment. The defendant was charged with so doing "by pushing, striking, assaulting and threatening the said J. A. Conway." He was put on notice that it would be proved on him that he did these things. He proposes to meet the charge and to show that he did not push, strike, assault or threaten the said Conway. The aiding and abetting may be made out by proving many other ways in which it may be done, totally foreign to those set forth in the indictment. The prosecution knowing this, proposes to strike out all these descriptive averments and leave an open field for any and all proof of any and all forms or ways in which the aiding and abetting may be shown. This would be permitting a defendant to be called upon to meet a charge specifically made in one form and then to allow him to be convicted by a change of the indictment on proof of acts totally distinct from those of which he was notified. It is hard enough that a defendant may be convicted on a general averment of "aiding and abetting," without subjecting him, after specific acts are charged, to the hazard of having them stricken after he may have prepared to meet them as made, and to a conviction for acts of any kind that the prosecution may see fit to produce. We do not think it can be done on principle or authority.

Judgment reversed.

PEACOCK, CHAPMAN & COMPANY, plaintiffs in error, vs.
BENAJAH PEACOCK, defendant in error.

Under the forty-ninth rule of the Superior Court, which the Judges were expressly authorized to establish by section 3712 of the Code it is necessary for the movant, in a motion for a new trial, to file a

Peacock, Chapin & Company vs. Peacock.

brief of the testimony in the cause under the revision and approval of the Court, and it is error for the presiding Judge, where a brief of the testimony has neither been filed or made out, to set aside a verdict on the ground that it is without evidence to support it, and contrary to the charge of the Court.

New trial. Rule of Court. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

Benajah Peacock brought complaint against Peacock, Chapman & Company, on a due bill dated April 6th, 1871, payable to plaintiff or bearer, for \$730 07. The defendants pleaded payment and set-off. The jury found for the plaintiff \$8 50. The Court, on its own motion, set aside the verdict, because it was without evidence, and contrary to the charge, and ordered a new trial. To which the defendants excepted.

To the bill of exceptions, the presiding Judge attached the following note:

"The Court set aside said verdict without requiring the plaintiff to comply with the usual formalities, because it was manifestly, palpably and directly against the charge of the Court and the evidence in the case. It was the result of bias or ignorance, and on these points there could be no doubt and no ground for disputation."

PEABODY & BRANNON, for plaintiffs in error.

BLANDFORD & CRAWFORD; B. B. HINTON, for defendant.

TRIPPE, Judge.

It may be true, as certified by the Judge who tried the case, that the verdict was manifestly, palpably and directly against the charge of the Court, and the evidence, etc.; but the law requires certain things to be done before a verdict can be set aside. The party in whose favor the verdict is, has a right that the testimony shall be made out by the movant under the revision and approval of the Court: Forty-ninth rule Superior Court.

The course adopted by the Court would require the successful party to take this burden, in order to avail himself of the privilege of having the judgment reviewed. This would be reversing the order of things, and overturn not only a long settled and unbroken practice, but the law expressly governing that practice. The Judges of the Superior Court had the power to establish this rule: Code, section 3246. It has been too often recognized by this Court, and too deeply engrafted in the practice in this State to be disregarded. It is binding whilst it stands.

Judgment reversed.

THOMAS T. PAGE, administrator, *et al.*, plaintiffs in error, *vs.*
ELIZABETH PAGE, defendant in error.

Where the widow had a homestead set apart to her and her minor children, out of the lands of her deceased husband, under the Act of 1868, and the same was levied on to satisfy an execution based on a claim contracted prior to the adoption of the Constitution of 1868, she is not barred from claiming her dower in said lands.

Homestead. Dower. Before Judge HERSCHEL V. JOHNSON. Johnson Superior Court. September Term, 1873.

For the facts of this case, see the decision.

JOHN M. STUBBS, by PEEPLES & HOWELL, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an application to the Superior Court to appoint commissioners for the assignment of dower. Page, the intestate, died 28th January, 1868. In July, 1869, the Ordinary set apart a homestead to his widow and minor children out of

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the lands of her deceased husband. The homestead was levied on to satisfy an execution issued on a judgment founded on a debt contracted prior to the Constitution of 1868. Objections were filed to the application on the ground that the widow of the intestate could not have a homestead and dower out of the land of the deceased intestate. The Court overruled the objections, and its judgment was excepted to.

There was no error in overruling the objections to the widow's application for dower, on the statement of facts contained in the record. She obtained no homestead out of the lands of the intestate, as against debts contracted prior to the Constitution of 1868, and her attempt to obtain one did not bar her of her right to dower.

Let the judgment of the Court below be affirmed.

SUSAN CASON, plaintiff in error, vs. JESSE T. MULLING, defendant in error.

Where upon a rule against the former and present sheriffs, requiring them to show cause why one or the other should not pay over the money due on a certain execution, the former answered that he turned over the *fi. fa.* to his successor in time to have made the money before Court, and the present sheriff set up that he was enjoined from proceeding thereon, it was not error in the Court, in the absence of a traverse of the answers, to discharge the rule.

Rule. Sheriff. Execution. Before Judge HERSCHEL V. JOHNSON. Jefferson Superior Court. May Term, 1873.

For the facts of this case, see the decision.

CAIN & BOLHILL, by Z. D. HARRISON, for plaintiff in error.

CARSWELL & DENNY, by brief, for defendants.

WARNER, Chief Justice.

This was a rule against a former sheriff and his successor in office to show cause why one or the other of them should not pay the money due on plaintiff's *fi. fa.* The former sheriff, by his answer, stated he turned over the *fi. fa.* to his successor in time to have made the money before Court, and the present sheriff answered that he was served with an injunction before the expiration of the time to have made the money by Court. There being no traverse of the answers in either case, the Court discharged both rules, and the plaintiff excepted. Where the answer of a sheriff to a rule to show cause is made in writing under oath, and not denied, the rule shall be discharged or made absolute, according as the Court may deem the answer sufficient or not: Code, sec. 3954. We find no error in the judgment of the Court on the facts as stated in the record, which will authorize this Court to interfere and control it.

Let the judgment of the Court below be affirmed.

JOHN H. WALTON, plaintiff in error, vs. W. A. LITTLE, defendant in error.

Where an attorney recovers different parcels of land for his client, under a written agreement that the attorney should have a particular lot so recovered for his services, and there is no evidence of fraud, or that the services were not worth what was contracted for, the attorney, under section 1979, Revised Code, can claim such lot against the lien of a judgment existing against his client at the time the agreement was made, the more especially if the creditor never sought to enforce his judgments against the land until subsequent to its recovery, after a protracted litigation on the part of defendant and his attorney.

Attorney's lien. Judgments. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

An execution in favor of John H. Walton against Thomas Baldwin, for \$508 51, principal, besides interest and costs,

Walton vs. Little.

based upon a judgment recovered at the October term, 1866, of Harris Superior Court, was levied upon lot of land number one hundred and seventy, in the seventeenth district of Talbot county, as the property of the defendant. The lot levied on was claimed by W. A. Little.

Upon the trial of the issue thus formed, it appeared that in 1866 the defendant in execution made a contract with the claimant, as an attorney at law, to sue for lots of land numbers one hundred and sixty-nine and one hundred and seventy, in the district aforesaid, promising to convey to him lot one hundred and seventy for his services; that he recovered said land for his client; that, subsequently, one Robert Baldwin, as administrator upon the estate of a Mrs. Taylor, filed a bill to recover said property, setting up a parol agreement between his intestate and said defendant in execution as to the same; that claimant successfully defended this proceeding; that the defendant then, on the 18th day of September, 1871, conveyed lot one hundred and seventy to him.

The Court charged the jury that, under the facts aforesaid, the property levied on was not subject to the execution, and a verdict was returned accordingly.

The plaintiff excepted to said charge, and now assigns error thereon.

E. H. WORRILL, for plaintiff in error.

W. A. LITTLE; HENRY L. BENNING⁴, for defendant.

TRIPPE, Judge.

Section 1979, Revised Code, provides that "the Attorney's lien shall attach for his fees * * upon all property recovered by him, and shall be superior to all other liens thereon." There was no objection made on the ground of fraud between the attorney and client, as against creditors, or that the attorney's services were not fully worth the fee contracted for. The lot of land which was to be given for the services was worth about one-third of the whole land recovered. The liti-

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gation was pending for many years, and in two forums. If there had been no recovery there would have been no compensation. The claim then of the attorney was good and uncontested for the amount he had contracted for. To that extent it was superior to the judgment creditors: *Morrison, Heard & Company vs. Ponder et al.*, 45 Georgia, 167. This being so, had lot one hundred and seventy been ordered to be sold, the attorney would have taken the proceeds. It would have availed the plaintiff in execution nothing. Why then go through the farce of a sale, the costs of which would have fallen on the claimant, the attorney? The attorney had a claim, a lien on the whole land recovered, to the extent of lot one hundred and seventy. He held a deed to that lot. Why not permit him to assert his title, his right in the claim case? Everything could have been determined on the trial of that issue as well as in any other proceeding. No one was hurt by it, and no right lost or put at hazard thereby.

Judgment affirmed.

C. S. & S. BURTS, plaintiffs in error, vs. CHARLES T. FARRAR, defendant in error.

The Constitution of 1868 intended to provide for an appeal to the Superior Court from the judgments of Justices of the Peace, in all cases where the amount in controversy between the parties was over \$50 00, whether that controversy originated in a claim case, or in any other class of cases of which the Justices of the Peace had jurisdiction to hear and determine.

Claims. Appeals. Justice Court. Before Judge UNDERWOOD. Whitfield Superior Court. October Term, 1873.

For the facts of this case, see the decision.

T. R. JONES; JOHNSON & McCAMY, for plaintiffs in error.

D. A. WALKER, by brief, for defendant. ~

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Burts vs. Farrar.

WARNER, Chief Justice.

This was a motion made in the Court below in arrest of a judgment which had been rendered in that Court. The motion was overruled, and the plaintiff in error excepted. The record containing the proceedings in the case in which the judgment was rendered is not before us. The agreed statement of facts as to what is in the record are, that Farrar sued out an execution, founded on a laborer's lien, for \$75 00, which was levied on a shingle machine worth \$400 00, and claimed by Burts. The execution was issued by a Justice of the Peace, and the claim was returned and tried before him, who decided that the property levied on was not subject. Farrar entered an appeal to the Superior Court, and on the trial of the appeal, the jury found the property levied on subject to the execution, and judgment was entered thereon. The motion in arrest of judgment is made on the ground that an appeal did not lie from the judgment of the Justice in a claim case to the Superior Court, and, therefore, that Court had no jurisdiction to try it and render a judgment thereon.

By the Constitution, Justices of the Peace have jurisdiction in civil cases where the principal sum claimed does not exceed \$100 00; but in cases where the sum claimed is more than \$50 00, there may be an appeal to the Superior Court, under such regulations as may be prescribed by law. The 2d section of the Act of 1868 provides for an appeal to the Superior Court from the judgment of the Justice, when the amount is over \$50 00, as contemplated by the Constitution, and this applies as well to the judgment of the Justice in claim cases as to his judgment in any other class of cases of which he has jurisdiction, where the amount claimed is over \$50 00. In this case, the plaintiff claimed \$75 00 to be due him, and levied his execution on the shingle machine, worth \$400 00, to satisfy that claim, and when it was claimed by Burts, the question for the judgment of the Justice was, whether it was subject to be sold to satisfy the plaintiff's claim of \$75 00, and that being so, either party dissatisfied

with the judgment of the Justice, had the right to appeal therefrom to the Superior Court. The Constitution intended to provide for an appeal to the Superior Court from the judgment of Justices of the Peace in all cases where the amount in controversy between the parties was over \$50 00, whether that controversy originated in a claim case, or in any other class of cases of which the Justices of the Peace had jurisdiction to hear and determine. There was no defect in the pleadings, or record, so far as the bill of exceptions discloses on the agreed statement of facts, which would authorize the Court to have arrested the judgment.

Let the judgment of the Court below be affirmed.

RICHARD R. GOETCHIUS *et al.*, plaintiffs in error, vs. MARY HODGES, administratrix, defendant in error.

1. The legal construction of the agreement made between the plaintiffs in error and the defendant, which was, by its terms, to be made an award, and was so made by the arbitrators and also entered on the minutes of the Court and made the decree thereof without exception, is that defendant was to receive from plaintiffs the amount therein specified by January 1st, 1871, for her interest in the partnership property, and that defendant was to deposit \$2,400 00 of said amount as an indemnity against her proportion of the liability for outstanding debts, under the terms set out in the agreement, and to protect the interest conveyed to Theodore Ewing against the same.
2. If there was ambiguity as to the meaning of the agreement, etc., the verdict of the jury rendered on the application to have a more full decree entered, and for an execution to enforce the same, and the issue made thereon, determined the questions involved, and authorized the order of the Court that was granted.

Contracts. Ambiguity. Verdict. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

Mary W. Hodges, as administratrix of Samuel K. Hodges, deceased, filed her bill against Richard R. Goetchius and Reuben H. England, making, in substance, the following case :

Goetchius et al. vs. Hodges.

On July 28th, 1856, complainant's intestate and Richard R. Goetchius entered into a copartnership, under the name and style of Goetchius & Hodges. Goetchius was to contribute to said business certain lots of land of the value of \$5,000 00, and Hodges \$5,000 00 in cash. The improvements to be made on said lots, in the erection of machinery, etc., were to constitute a portion of the capital stock. Hodges was to keep the books and be the financial agent of the firm. Goetchius was to give his whole time and attention to the mechanical portion of the business. The partnership was to continue until dissolved by mutual consent, or the death of one of the partners, or by operation of law. An inventory and balance sheet was to be made annually and each party allowed to draw out a portion of the profits. In case of the death of either partner, the survivor should conduct the business for the benefit of all parties until the close of the current year, and the legal representative of the deceased, with the surviving partner, were allowed still further to continue said business as long as they might consider best.

Hodges fulfilled all of his undertakings under said contract of partnership. The business of the firm commenced on October 1st, 1856, and continued until September, 1864, when Hodges died intestate, leaving complainant as his widow, his only heir-at-law.

The profits of the firm were invested in materials, machinery and buildings adapted to the business, which was for steam planing, sash making, and other matters in connection with house building, so that at the death of Hodges the partnership property was worth from \$50,000 00 to \$60,000 00. At the close of the war the lots and buildings were worth, and are now worth, from \$30,000 to \$40,000 00, whilst the firm indebtedness did not exceed \$3,000 00, with interest from about the year 1861. At the death of Hodges he owned three-eighths of the whole property, and was liable for the same proportion of the firm debts, having, during his life, with the consent of Goetchius, received into the business the defendant, England, by selling to him one-eighth of his half interest.

After the close of the war, the defendants, being in possession of the firm property, went on to repair the same and to carry on the business hitherto conducted, and to lease out to other parties, at large rents, parts of said firm property, avowedly for the purpose of paying the partnership debts. They submitted to complainant a proposition to carry on the business in the name of Göetehius, England & Hodges, the defendants each reserving to himself, as a part of the expenses, \$1,200 00, to which complainant refused to accede, deeming it best that the creditors should be paid off and the partnership closed. Against the objection of complainant, the defendant, Göetehius, has continued to use the name of Göetehius, England & Hodges, to use said machinery to its great detriment and injury, and to appropriate all the proceeds thereof to himself. He has not paid off any of the debts of Göetehius & Hodges, but has allowed the same to be sued and to accumulate with interest. The defendants have not paid to her anything for the use of said property except \$691 26. Upon a fair accounting, said defendants, after paying the debts of the former firm of Göetehius & Hodges, would be indebted to her in a large amount, for which she is entitled to a lien on said property.

Göetehius has filed a bill for partition, asking for a sale of said property, in which he claims a large part of the machinery aforesaid to be his individual property. If said petition is granted, and said property sold before the defendants shall account to complainant for her interest in the same, ignorant of what the sum may be, she would be compelled to raise the whole amount which might be bid for said property, or stand by and see her interests sacrificed.

Prayer, that Göetehius may be enjoined from proceeding with said petition for partition; that a receiver may be appointed to take charge of said estate and rent the same; that the defendants may be required to deliver the books of said firm, and the accounts and vouchers belonging thereto, to said receiver; that the defendants be restrained from collecting any

Gøetchius et al. vs. Hodges.

partnership debts; that an account be had; that the writ of subpœna may issue.

The defendants answered, substantially, as follows: The firm of Gøetchius & Hodges was formed, as stated in the bill, and continued until July 9th, 1860, at which time Hodges sold to one Theodore Ewing an interest of one-eighth in said business. The new firm continued business, under written articles of agreement, in which it was stipulated that Gøetchius, for his skill and services, was to receive an annual salary of \$1,200 00; Hodges, for his services, \$1,000 00, and Ewing, \$900 00. In April, 1863, Ewing sold his interest to England. The business was continued under the name of Gøetchius, Hodges & Company until the death of Hodges, which took place in September, 1864. In July, 1860, the property of the firm of Gøetchius & Hodges, including the outstanding indebtedness to them, was estimated to be worth \$50,000 00. During the war, in October, 1863, the Confederate States Government took possession of the real estate, machinery, etc., of said firm for public purposes, and retained possession until April, 1865, at a rent of \$1,200 00 per annum, in Confederate money. During the month last aforesaid, Wilson's command of Federal forces entered the city of Columbus and were about to burn all of the aforesaid property, when, through the exertions of the Rev. Dr. Hawks, the buildings were saved on the condition that all of the Confederate property should be burnt in the streets and the machinery destroyed, which was accordingly done. A short time after the destruction of the aforesaid machinery, the defendants and complainant had a conference in reference to the repairing of the same. It was agreed that the repairs should be made at the joint expense of all parties in proportion to the respective interests held by them. Defendants made the repairs at a large expense, to-wit: \$8,650 00, besides the earnings of the business, but complainant has failed and refused to pay her proportion thereof. They have paid all the debts outstanding against Gøetchius & Hodges, except those to which they had a legal defense. Defendants deny that they carried on business in the name

of Goetchius, Hodges & England, or that they have incurred new liabilities for which complainant is bound. They deny that the profits have been large. The destruction of their machinery in April, 1865, necessarily incurred heavy expenses, and the desolate condition of the country forbade large profits. They admit the filing of the petition for a partition. Having made various efforts to get complainant to a settlement and failed, they took this step to force such a result. Since the filing of complainant's bill, they have made no motion in reference to said partition, under the hope that a full and fair account might now be had.

The answer then proceeds at length to give a detailed statement of the business, etc., of the aforesaid firms, all of which is omitted as unnecessary to an understanding of the decision.

The matters in controversy were submitted to arbitration by an agreement executed on March 15th, 1870, William A. Barden selected by complainant, George W. Woodruff by defendants, and James M. Smith by the arbitrators.

Pending the arbitration, on November 5th, 1870, the following agreement was entered into :

"This agreement, made and entered into this 5th November, 1870, between Mary W. Hodges, administratrix and sole heir-at-law of Samuel K. Hodges, deceased, she being the widow of said Hodges, who died intestate, of the one part, and Richard R. Goetchius and Reuben H. England, of the other part, witnesseth, that whereas, certain matters of difference have heretofore existed between the said parties as to the terms of dissolution of the late partnership of Goetchius & Hodges, which expired by the death of Samuel K. Hodges, and which the said Mary refused to continue ; and whereas, all such differences have been settled on the following terms, to-wit: the said Mary W. is to receive \$7,500 00 for her three-eighths undivided interest in the property known as the Columbus Steam Planing Mills ; and whereas, there are certain judgments and debts outstanding against the said firm, a list of which is hereto appended, it is further agreed that Mrs. Hodges shall invest the sum of \$2,500 00 in United States

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five-twenty bonds, or other good security of bond and mortgage, if she can obtain a greater rate of interest, which interest she shall be allowed to draw and use, said securities to be deposited in the hands of Smith & Alexander, as attorneys of Theodore Ewing, and to be held by them as an indemnity to the said Ewing until all of said debts shall be compromised, or in some other way finally discharged, when the same are to be paid over to Mrs. Mary W. Hodges, her heirs or assigns, and in case at any time a judgment, founded upon the debts herein set forth, should be about to sell the interest conveyed to Theodore Ewing, then the said Smith & Alexander shall be at liberty to use any of said securities for the purpose of paying off the same. And it is further agreed that if either the said Ewing, or the said Goetchius, or any one for them, shall, directly or indirectly, purchase or pay off any of said claims at less than the face thereof, Mrs. Hodges shall only be charged the actual amount at which said claims were purchased or paid off; and that William A. Barden, George W. Woodruff and James M. Smith, arbitrators, each receive \$200 00, to be paid *pro rata* by the several parties. And we agree that this shall stand as an award, provided the payment above stated of \$7,500 00 shall be made by the first of January, 1871.

(Signed)

"MARY W. HODGES, Adm'rx,

"per R. J. Moses, Attorney.

(Signed)

"R. R. GOETCHIUS,

"R. H. ENGLAND,

"by M. H. Blandford, Attorney at Law."

At the November term, 1870, of Muscogee Superior Court, the foregoing agreement was returned by the arbitrators as their award, entered on the minutes and made the decree of the Court. At the May term, 1873, of said Court, complainant moved for a more full decree, and for execution. The defendants showed to the contrary, as follows:

1st. Said award was not rendered upon the submission made, but upon a contract and agreement entered into subse-

quently by movant, defendants, and one Theodore Ewing, who was not a party to the arbitration, which contract was that movant was to sell to Ewing her intestate's three-eighths interest in the Columbus Planing Mills property at and for the sum of \$7,500 00. The deed was made and deposited as an escrow, to be delivered upon the payment by Ewing of the said sum of \$7,500 00, which was not binding upon any of the parties unless paid by January 1st, 1871.

2d. Because it was never intended between movant and defendants that they were ever to be the purchasers of said interest, or responsible therefor, or that any decree or judgment should be entered by the Court against them for the said \$7,500 00, but that the award was to be of no effect except the purchase money was paid by Ewing, the purchaser, and not by these defendants.

3d. Because Theodore Ewing, the purchaser of movant's three-eighths interest, is not a party to any of the proceedings before the Court, is not within its jurisdiction, and therefore no decree can be rendered against him.

4th. Because the award of the arbitrators was founded upon a condition precedent, which has not been performed, and without which the award cannot be legally executed.

5th. Because the decree asked for would make defendants purchasers of property they never bought, or the securities for the purchase money thereof, and for which they never bound themselves, nor in anywise made themselves liable.

Issue was joined by the movant as follows :

"And the said Mary W. Hodges says that said agreement for an award was made by the parties as set forth, and that when said agreement was made, the said Göetehius & England undertook that Theodore Ewing would buy the three-eighths interest of Mrs. Hodges, and that all she agreed to do, or was expected to do, was to wait until January 1st, 1871, for the payment of the money."

The jury found the issue in favor of the complainant; whereupon, the Court ordered and decreed "that a writ of execution do issue, to be directed to the sheriff of said county of

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Muscogee, commanding him to seize and sell the said Planing Mills in said bill and decree specified, under the rules regulating sheriff's sales, and that from the money so raised he pay to said Mary W. Hodges the sum of \$7,500 00, with interest thereon from the 1st of January, 1871, less the sum of \$2,500, which last sum is to be paid over to Messrs. Smith & Alexander, under the provisions and terms of said decree in said cause.

"And it is further ordered and decreed that said sheriff, upon said sale and payment of the purchase money, he shall make to the purchaser or purchasers a conveyance therefor in fee-simple, and that he make due return of his actings on said writ of execution to this Court on the first day of the next term thereof."

To this last order the defendants excepted, and now assign error thereon.

BLANDFORD & CRAWFORD; INGRAM & CRAWFORD, for plaintiffs in error.

R. J. MOSES, for defendant.

TRIPPE, Judge.

1. The exception to the order of the Court is, that the agreement of the parties which was, by its terms, to be made the award of the arbitrators, and was so made, and entered on the minutes of the Court and made the decree thereof, did not bind plaintiffs in error for the payment of the \$7,500 00 which was to be received by complainant for her three-eighths interest in the property, but was to be paid by Theodore Ewing. Ewing was not a party to the submission, the agreement or the award, nor the order making the award the decree of the Court. The parties litigant were Mrs. Hodges on one side and Goetchius and England on the other. The award was, that she should receive \$7,500 00 for her interest in the property. Receive it from whom? There could be but one source from which it could come by the award. If

one party to a suit is to receive money in settling the litigation, the other party certainly must pay it, and must be bound to pay it, else the award and the judgment is a nullity. Courts do not grant judgments as mere surplusage, as a matter contingent on what an outside party may choose to do. At least they will not be so construed, unless it plainly appears that the parties so intend. We do not think that such intention so appears in this case. It is true the agreement and award speak of an interest to be conveyed to Ewing, and probably it was Mrs. Hodges' interest. But that even is not so stated. She was to deposit a portion of what she was to receive as a security to protect the interest conveyed to Ewing against any debts due by the company. This suggests that Ewing was to have her interest. But it is nowhere said that Ewing was to make the payment to her, or that she was to look to him for it; nor, indeed, that Ewing was to pay the \$7,500 00 to any one, or what amount, if any, he was to pay, or to whom. The award and judgment were between Mrs. Hodges and Göetichius and England, and they had the right to call on each other respectively for its enforcement.

2. But even if there was on the face of the agreement, award and decree any ambiguity on this point, these very questions were made and issue joined, and they were passed upon by a jury. That verdict stands; there is no motion to set it aside, nor any complaint made against it. Was it, too, a vain thing, like, it is claimed, the agreement was; and the award and the order making the award the judgment of the Court? Do they all mean nothing, taken singly or collectively? What, then, would end this litigation? What are and where are the rights of the complainant? We think that the verdict of the jury, rendered on the application for an execution to enforce the decree and the issue made thereon, determined the questions involved, and authorized the order of the Court that was granted. If there were errors committed in obtaining that verdict, exceptions should have been made to them, and their correction sought.

Judgment affirmed.

City Council of Augusta vs. Marks.

CITY COUNCIL OF AUGUSTA, plaintiff in error, vs. DAVID W. MARKS, defendant in error.

The owner of land taken for the use of the public, is entitled to be paid therefor the value thereof in money; but if, in appropriating his land for the use of the public, consequential damages result to the owner, the benefits which he may have derived from the appropriation, if any, may be set off against such consequential damages, but not against the value of the land.

Constitutional law. Eminent domain. Damages. Before Judge GIBSON. Richmond Superior Court. October Term, 1873.

For the facts of this case, see the decision.

J. C. C. BLACK; W. H. HULL, for plaintiff in error.

H. CLAY FOSTER, for defendant.

WARNER, Chief Justice.

It appears from the record in this case that the City Council of Augusta, by an ordinance of the city, in pursuance of an Act of the General Assembly, approved 24th of August, 1872, for the purpose of opening, changing, widening and extending the streets in said city, took from the appellant, Marks, three 127-1000 acres of his land. Three appraisers were nominated, according to the provisions of the Act of the General Assembly, to assess the damages—one by the appellant, one by the Mayor of the city, and the other by the Ordinary of the county of Richmond. Two of the appraisers made the following award: "That the city of Augusta has taken from D. W. Marks, for the purpose aforesaid, three 127-1000 acres of land, and that the land from which this is taken is worth \$700 00 per acre; that we consider that he has been benefited \$350 00 per acre. For the three 127-1000 acres of land so taken, we therefore award said D. W. Marks the sum of \$1,094 45, to be paid by the city." From this award of the appraisers, Marks appealed to the Superior

Court, and on the trial thereof, there being no controversy as to the facts, the Court held and decided that the Act under which the proceedings were had did not authorize the benefits to be deducted from the value of the land taken, and directed a verdict for the appellant for the value of the land taken by the city; whereupon, the City Council, by its attorney, excepted.

By the Act of 1872, it is provided that the appraisers appointed to assess the damages shall, in all cases, in making up their award, consider the benefits from the opening, changing, widening or extension of such streets accruing to the owner or owners of such land or other property, and set off such benefits against such damages, but in no event giving an award against such owner or owners for the excess of benefits over damages. Construing this Act of the General Assembly in the light of the decision of this Court in the case of *Jones vs. The Wills Valley Railroad Company*, 30 *Georgia Reports*, 43, and the case of *The Mayor and Aldermen of Savannah vs. Hartridge*, 37 *Georgia Reports*, 113, both of which had been decided before the Act in question was passed, we cannot presume that a different rule as to setting off benefits against damages was intended than the one recognized by the decisions of this Court, to-wit: That the owner of land taken for the use of the public, is entitled to be paid therefor the value of the land so taken in money; but if, in taking and appropriating his land for the use of the public, consequential damages result from such appropriation to the owner thereof, the benefits which such owner may have derived from such appropriation of his property, if any, may be set off against such consequential damages, but not against the value of the land so taken for the use of the public. The verdict for the value of the land, in money, at the time the same was taken for the use of the city, was right, according to the decisions of this Court before cited.

Let the judgment of the Court below be affirmed.

Fannin vs. Thomason.

ISHAM S. FANNIN, administrator, plaintiff in error, vs. PARMENIUS R. THOMASON, defendant in error.

1. On the trial of a motion made under the Relief Act of 1868, to open a judgment rendered in 1867, upon a note dated February 13th. 1861, and due at twelve months, it is not competent for the defendant to prove that in April, 1861, he tendered bank bills in payment of the debt, and that the creditor, or his agent, then refused to accept the bills, or any payment of the note.
2. Where such a motion is filed on the further ground that the creditor had agreed during the war to receive in payment of the debt seventy (7-80) Confederate treasury notes and Georgia bonds, and that movant, by sale of cotton, had procured such notes and bonds and tendered them, which were refused, and it appeared that the movant had kept them until the trial, but collected the interest which accrued on the bonds and notes for his own use:

Held, That the collection of the interest by the movant was an appropriation of the bonds and notes for his benefit, and he cannot claim that under said statement of facts the debt is discharged and satisfied.

Relief Act of 1868. Tender. Evidence. Before Judge BARTLETT. Morgan Superior Court. September Adjourned Term, 1873.

This is the second time this case has been before the Supreme Court. See 45th *Georgia Reports*, 533.

Isham S. Fannin, as administrator of Mary Johnson, brought complaint against Parmenius R. Thomason on a note for \$3,319 81, dated February 13th, 1861, and due twelve months after date. In March, 1867, the defendant confessed judgment for the amount sued for. In November, 1869, he moved to open said judgment upon the following grounds:

1st. That in May, 1861, he offered to pay Launcelot Johnston, who had control of said note, the amount due on the same in bank bills, such as Georgia Railroad, State Bank, and such like bills, which Johnston refused to take. Afterwards he offered to pay said note in Confederate money, which was also refused.

2d. That in February or March, 1863, Johnston, the agent of the payee, Mary Johnson, agreed to take interest-bearing

Confederate notes and State bonds. The defendant, upon said agreement, had sold, through Walker & Son, commission merchants, two hundred and four bales of cotton which he had in their warehouse in the city of Augusta, realizing from same \$10,191 00, with which he purchased interest-bearing Confederate notes and State bonds to an amount sufficient to discharge said note. Two or three weeks after said agreement and sale of cotton, he offered the same to said agent, who replied that he had now changed his mind, and would not take them. Said Confederate notes and State bonds were entirely lost to him by reason of such refusal, whereby he was damaged to the amount due on said note.

Upon demurrer to said motion, the first ground was stricken.

The evidence sustained the second ground. But it further appeared that after the tender of the interest-bearing Confederate notes and State bonds, the defendant had collected the interest thereon and appropriated it to his own use, until they became worthless from the results of the late war. The bonds and notes were produced in Court.

The jury found in favor of the movant.

The plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in not sustaining the demurrer to the second ground of said motion.

2d. Because the jury found contrary to the charge of the Court, that "a tender must be continuous, and if they believe from the evidence that after the tender there was interest collected by the movant, (if they believe there was a tender,) then the tender is not continuous, and movant cannot avail himself of that as a tender."

3d. Because the verdict was contrary to the evidence and the law.

The motion was overruled, and plaintiff excepted.

FANNIN & BILLUPS; A. G. & F. C. FOSTER, for plaintiff in error.

REESE & REESE, for defendant.

TRIPPE, Judge.

1. The first ground in the motion was, that defendant, in May, 1861, tendered bank bills in payment of the debt, which were refused. This ground was stricken by the Court. If it was proper to reject this as a legal ground of defense, then the testimony setting up the facts therein recited would have fallen with it. After this point in the motion was ruled out, there was no foundation laid by the pleadings for the evidence on that branch of the case. Furthermore, the proof of tender of bank bills in May, 1861, nine months before the debt was due, and the refusal to accept them by the creditor, can, neither in law or equity, afford any ground of defense to the debtor. Nor was it shown what afterwards became of the bills. In fact, the testimony as to the bank bills could not, by any possibility, be of any legal force, and should have been rejected.

2. Another question is presented in the matter of the Confederate and Georgia bonds. If they were procured under circumstances which would have made their tender and refusal a cause of defense for the debtor, it was from the fact that under the tender they were the property of the creditor. A valid tender, even of chattels, transfers the title to the person bound to receive, and the possession of the promissor, if he retains possession from that time, is for the benefit of the owner: Code, section 2877. This rule is for the benefit of the debtor; but there is an obligation resting upon him which he cannot disregard, and if he does disregard it he loses the advantage that the law would otherwise give him. By the tender, he makes the articles tendered the property of his creditor, so long as he does not violate that obligation. By the refusal to accept, and his retaining possession, he becomes, as it were, a bailee of the creditor, bound for ordinary prudence in their preservation and protection. If the articles are such as are consumed by use, he cannot use them. Nor if the use necessarily depreciates their value, should he use them or permit them to be used, unless it be to discharge necessary ex-

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penses for their protection. If they be promissory notes, he cannot collect and use for himself the interest accruing on them, for such would be in conflict with the right of the owner—would be a conversion, and equivalent to a withdrawal of the tender and a destruction of all rights under it. So in this case. If the bonds were tendered and thereby became the property of the creditor, the debtor, while he retained possession, should have preserved them just as they were, with all their incidents, the coupons attached and the interest accruing on them, at the command of the creditor, as they would have been had they been in his possession. He who takes the horse or carriage of another and uses it, or hires it out, is guilty of conversion, and if a debtor collects for his own use the interest on bonds belonging to his creditor, it is an act negating the right of any other person as the owner.

A tender must be a continuing tender. The debtor must be able all the while to meet the call for the articles tendered without any depreciation or lessening of their value resulting from any act of his. When in this case he cut off the coupons or collected the interest on the seven-thirty notes, they were not then what they were when he offered them to his creditor. If the bonds and notes were the property of the creditor by virtue of the tender, so was the interest, which had accrued, and which had thereafter accrued. The debtor's collection of that interest and appropriating it to himself lost him any further right to demand their acceptance by his creditor in their mutilated state. As to what is the duty of one making a tender which is refused, in disposing afterwards of the thing tendered, see *Fulton Bank of New York vs. The Marine Bank of Chicago*, 2 Wallace, 252. We say nothing about the conflict between the testimony as to the identity of the treasury notes, and the dates of the issue of several of them, and the times when some of the interest was collected. In our opinion a new trial should have been granted.

Judgment reversed.

W. T. & L. D. WALTON, plaintiffs in error, vs. PHOCIAN
RAMSEY, defendant in error.

When a tract of land is sold in a body, as containing so many acres, "more or less," and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned.

Vendor and purchaser. Warranty. Deed. Land. Before Judge GIBSON. Columbia Superior Court. September Term, 1873.

For the facts of this case, see the decision.

W. M. & M. P. REESE; C. H. SHOCKLEY, for plaintiffs in error.

ROBERT TOOMBS, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant to recover damages for an alleged deficiency in the number of acres in a tract or settlement of land sold by the defendant to the plaintiffs. On the trial of the case, as it appears from the record, the plaintiffs offered in evidence a deed from the defendant to them, by which he bargained, sold and conveyed to the plaintiffs, in consideration of the sum of \$12,000 00, all that tract or parcel of land situate and lying in Columbia county, in this State, containing twelve hundred acres, more or less, adjoining lands of J. S. Walton, R. L. Lambkin, A. Lambkin and others, and warranted the title thereto. The plaintiffs claimed there was a deficiency of one hundred and fifty-six acres in the tract or settlement of land sold. On this statement of facts, the defendant demurred as to the right of plaintiffs to recover. The Court sustained the demurrer, and the plaintiffs excepted.

There is no pretence that there was any fraud practiced in the sale of the land, or that the purchasers did not have an equal opportunity with the seller to know the number of acres

the tract or settlement of land contained, within the prescribed boundaries mentioned in the deed. In the case of *Beall vs. Burkhalter*, 26 *Georgia Reports*, 564, this Court held and decided that, unless, where the enumeration of the quantity of land sold is of the essence of the contract, and not matter of description merely, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed. In delivering its judgment in that case, the Court said—"When the words 'more or less' are annexed to the quantity of land, it is against principle that the vendor should be responsible to assure any given number of acres, unless he practiced a fraud upon the purchaser." The Code declares that in a sale of lands, if the purchase is *per acre*, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or entire body, a deficiency in the quantity sold cannot be apportioned. If the quantity is specified as "more or less," this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud; in this event, the deficiency is apportionable—the purchaser may demand a rescission of the sale or an apportionment of the price according to relative value: Code, 2642.

It is contended by the plaintiffs in error that the Code introduced a new element of fraud which was not recognized by the Court in *Beall vs. Burkhalter*, to-wit: Legal fraud. We do not think so. The principle recognized in that case and by the Code is, that when a tract or settlement of land is sold in a body, as containing so many acres "more or less," and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned. The deficiency in quantity might be so great as to justify the suspicion of actual fraud and willful deception; but that is not this case, and, in our judgment, it comes within the decision made in *Beall vs. Burkhalter*, and must be controlled by it. The principle recognized by that case and the Code is, that if there is actual fraud and deception on the part of the vendor of the land, or the deficiency

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in the quantity of the land is so gross as to be evidence of it, then the deficiency may be apportioned, but not otherwise.

Let the judgment of the Court below be affirmed.

**MAYOR AND COUNCIL OF THE CITY OF MACON, plaintiff
in error, *vs.* THE CENTRAL RAILROAD AND BANKING
COMPANY, defendant in error.**

[This case was argued at the last term, and decision reserved.]

1. Statutes under which exemption from taxation is claimed by corporations, will be strictly construed, and the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the Legislature.
2. The Act of 29th December, 1869, providing that the "stock of the Macon and Western Railroad Company shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do, to wit: one-half of one per cent. on the amount of the net income," does not confer on the company an exemption of its property within the city of Macon from liability to be taxed by the city authorities as it was before the passage of said Act.
3. The city of Macon, under its charter, has power to tax all real and personal property within its limits, and there is nothing in the charter of the Macon and Western Railroad Company, or in any statute, that exempts the property of the company thus situated from the right of the city to assess the taxes complained against.

Corporations. Taxes. Laws. Macon. Before Judge HILL.
Bibb county. At Chambers. August 21st, 1873.

The Central Railroad and Banking Company filed its bill against the Mayor and Council of the city of Macon, making this case:

The defendant has issued three executions against the Macon and Western Railroad Company for taxes for the years 1870, 1871 and 1872, respectively, the first for \$1,095 00, the second for \$1,060 00, and the third for \$1,642 50, which have been levied upon property formerly belonging to said company.

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The Macon and Western Railroad Company has been, by an Act of the General Assembly of the State of Georgia, approved August 26th, 1872, merged into complainant. The property against which said taxes were assessed, and now levied on, with certain exceptions, was indispensable to the successful transaction of the business of the Macon and Western Railroad Company, and now occupies the same relation to the business of complainant, being used for depots, tracks, shops, etc. The exceptions referred to have been regularly returned for taxation and taxes paid thereon. This property composed a part of the capital stock of said company, and is now embraced in the capital stock of complainant. Neither under the laws of the State of Georgia, the amended charter of the Macon and Western Railroad Company, of date February 11th, 1869, nor under the charter of the city of Macon, has the defendant the right to assess and levy such a tax. Prays the writ of injunction.

The answer and affidavits are unnecessary to an understanding of the decision.

The bill was sanctioned, and the writ of injunction ordered to issue. Whereupon the defendant excepted.

JOHN B. WEEMS; R. W. JEMISON, for plaintiff in error.

LYON & IRVIN, for defendant.

TRIPPE, Judge.

1. It is a cardinal rule in the construction of grants by the public that nothing passes by implication; that statutes under which special privileges, amongst which is exemption from taxation, are claimed by a corporation, will be strictly construed in favor of the public, and the exemption will not be held to be conferred unless the terms of the grant clearly and distinctly show that such was the intention of the Legislature. So uniform are the authorities on this point that it is unnecessary to discuss it, or to refer to but a few of them: 3 Peters, 289; 4 Peters, 514; 6 Peters, 736; 19 Pennsylvania, 144; 8

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Howard, 581 ; 10 Howard, 376 ; 1 Black., 358, 436. The principle has been repeatedly recognized by this Court: 9 *Georgia*, 517 ; 7 *Georgia*, 221 ; 8 *Georgia*, 23.

2. The exemption from liability to the tax complained against in this case, is claimed by defendant in error under the Act of February 9th, 1869. The title and the first section of that Act, which is all that is necessary to refer to, is as follows :

“AN ACT to amend the charter of the Macon and Western Railroad Company, which was assented to on the 29th of December, 1847 ; to allow an increase of the capital stock of said company ; to fix the rate of tax to be paid by the same, and for other purposes.

“SECTION I. *Be it enacted, etc.,* That the said Macon and Western Railroad Company is hereby authorized to increase its capital stock so as to make the same (\$2,500,000 00) two million five hundred thousand dollars. This increase may be made from time to time, as it may be deemed expedient by a majority of the board of directors of said company for the time being, and by such sum or sums as said board of directors may order and determine ; and said board of directors for the time being, is hereby authorized, by a majority, to prescribe the terms and conditions of subscription for such additional stock as may, from time to time, be required : *Provided, nevertheless,* that such additional stock, as it may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do, viz : one-half of one per cent. on the amount of the net income.”

The consolidation or union of the Macon and Western Railroad with that of the Central Railroad took place after these taxes had been assessed on the property of the former, and, therefore, the question is not affected by any provisions in the charter of the Central Railroad. The taxes are for the years 1870, 1871 and 1872.

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3. Assuming, at this point, that the city of Macon had the power to levy these taxes prior to the Act of 1869, the question is, did that Act grant to the company an exemption of its property within the city of Macon from liability to be taxed by the city authorities as it was before the passage of the Act. The terms of the Act are really peculiar. There is, in words, no exemption whatever from any taxation, nor an express limitation as to the extent to which it might be taxed, even by the State. The words touching the question are: "*Provided, nevertheless*, that such additional stock, as it may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do, viz: one-half of one per cent. on the amount of the net income." The most that can be claimed from this is, that the State, in its annual tax law, will not assess upon the stock of the company, as tax for the State, more than one-half of one per cent. on the net income. And, for this reason, as a ground for such construction, the company, before this Act, was liable to be taxed on the amount of its stock, say one-half of one per cent. on \$1,500,000 00. If the stock were increased to \$2,500,000, it would be liable to the same rate on the increased amount, to-wit: one-half of one per cent., or whatever the rate might be, on the additional \$1,000,000 00 of stock. To avoid this, the company, doubtless, desired some assurance; and, as there was then a tax of one-half of one per cent. on the net income, assessed by the State on all railroads, and had been for eleven years, the provision quoted was inserted, making it subject to the general tax law as to railroads.

But it is totally unlike the guaranty or exemption granted any other company. In the charter of the Georgia Railroad, the clause is, "*The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion, etc.; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.*" Prince's Digest, 308. Here is a clear negative against a liability to be taxed beyond

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the prescribed limit. And it was so held in *The Georgia Railroad and Banking Company vs. The City Council of Augusta*, 26 Georgia, 651. And so in the charters of the other railroads which grant any exemption, express negative words are used against the liability to taxation except at a specified rate, such as, "shall not be subjected to be taxed higher," "shall not be taxed higher," "nor shall any other tax be levied and collected," etc. In none of these is there any expression stating that no other tax, except at the specified rate, shall be levied "*by the State*," or shall be paid "*to the State*." In the charter of the Muscogee Railroad the words are, "shall not be taxed *by the State* higher than one-half of one per cent. upon its net income," but it is immediately added, "*nor shall any other tax* be levied or collected on the stock of said company."

By the Act of 1869, the Macon and Western Railroad Company was authorized to increase its capital stock to \$2,500,000. No further road was to be built; no additional improvements were required; no public interest to be subserved, or benefit gained. So far as the Act shows, it only authorized the directors, from time to time, to raise the then amount of capital stock, one and a quarter or one and a half millions, to two and a half millions. No burden was thereby to be assumed by the company which was not then upon it, except that the increased stock would have increased its liability to be taxed by the State. Hence, to guard against that, were probably added the words, that it should thereafter "pay the tax assessed on other roads, one-half of one per cent. on the net income."

We do not say that this exemption was secured as a chartered right, under the peculiar phraseology of the Act. It is not necessary to pass upon that. But it is our opinion that under no proper construction of this Act can it be held that the real estate of the company, situate in the city of Macon, had any privileges secured to it against the taxing power of the municipal authorities.

If, then, there is no exemption in the charter of the Macon

and Western Railroad Company, or in any Act amendatory thereof, what is there to prevent the Mayor and Council of the city of Macon from taxing its property within the limits of the city? By the city charter, they "have power and authority to levy and collect a tax upon all property, real and personal, within the limits of the city:" Act of March 21st, 1866. The power to tax all real and personal property is clear and explicit. If the lots and parts of lots on which this tax is assessed were the property of an individual citizen, no question would be raised. But it is said that power to tax these lots on which are the machine shops, depot buildings, and part of the road-bed of the company, implies the power to seize and sell, and that thus a portion of the appurtenances of the road might go into the hands of strangers, and that it could not be the intent of the Legislature to permit such important interests as these are to be thus crippled by the danger of dissolution by piecemeal. Would not the same danger exist if a judgment creditor were to levy on this property? Could he not levy on the lots on which are situate these machine shops and buildings? Debts due the public or private creditors may be, and often are, great inconveniences; but that does not affect the question of liability to pay. It is not a good objection to say, if a certain piece of property is liable to a tax, or a debt, that it might be sold for its payment, and the owner seriously paralyzed in his business. If a railroad company is solvent, the tax or debt could be, and would be, paid to avoid such great damage. If it were insolvent, and could not pay, it and its creditors might protect themselves against the ruin or sacrifice caused by sales of detached portions of its road. No person, be he a man or a corporation, can claim that his legal liability to bear a share of the public burden is to be determined by the money he might lose, or the damage that might ensue to his property if that liability be enforced. As a matter of policy, the Legislature has granted to several corporations a total exemption from taxation, or fixed their liability at a limited rate. That is a matter with the law-making power. If no such immunity is granted,

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then all property is alike bound by the same law, and none has any privilege that does not belong to all.

On the other side, it might be, and has been asked, why should not the property of a railroad company, situate in a city, which may be of very great value, and which has all the benefit and protection of the municipal authorities and ordinances, the police and fire organizations, kept up and supported at the expense of the city, be subject, like all other city property, to bear a portion of the burdens which such benefits necessarily require? But it is unnecessary to enter into this question. It is not a sufficient answer to say that some of the property of the company might thereby run the hazard of being seized and sold, and the whole corporate estate and franchise be endangered. It cannot be taxed higher than what is assessed on any other citizen, and if that be paid, all risk to property or franchise is avoided.

Suffice it to say, that where relief from a common burden is claimed, it must be made to appear that the exemption has been distinctly granted by the authority which has the power. We do not think that this can be gotten from the Act of February 9th, 1869; and it is further our opinion that, under the powers conferred by the city charter, the Mayor and Council of the city of Macon had authority to levy and collect these taxes, and that there was error in granting the injunction restraining their collection.

Judgment reversed.

EZEKIEL B. SMITH, plaintiff in error, *vs.* JAMES WHITTLE,
defendant in error.

JOHN DURDEN, administrator, plaintiff in error, *vs.* JAMES
WHITTLE, defendant in error.

A homestead, set apart to the defendant in execution, under the Act of 1868, though conveyed to the claimant with the approval of the Ordinary, is nevertheless subject to a judgment against said defendant, rendered before the passage of said Act.

Homestead. Judgments. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

The two foregoing cases, embracing the same question, were argued and determined together.

For the facts of this case, see the decision.

WILLIS & WILLIS; MARION BETHUNE; E. H. WORRILL, for plaintiffs in error.

B. B. HINTON & SON, for defendant.

WARNER, Chief Justice.

This was a claim case, and comes before this Court on a bill of exceptions to the charge of the Court at the trial thereof. In 1862, the plaintiff in execution obtained a judgment against the defendants. In 1869, a homestead was set apart to the defendants, which was subsequently conveyed by deed to the claimant for a valuable consideration, with the approval of the Ordinary. The property was levied on as the property of the defendant in execution. The Court charged the jury, in substance, that, upon the foregoing statement of facts, the property was not subject to the execution levied thereon, to which charge the plaintiff excepted. This case comes within the ruling of this Court, in *Gunn vs. Thornton*, decided at the last term, and therefore must be controlled by it.

The case of Durden, plaintiff in execution, vs. Walton, defendant, and Whittle, claimant, in which the same question is involved, was argued in connection with the case first stated. In our judgment the Court below erred in its charge to the jury in both cases..

Let the judgment of the Court below, in both cases, be reversed.

Nussbaum & Dannenberg vs. Ross.

NUSSBAUM & DANNENBERG, plaintiffs in error, vs. ALBERT B. ROSS, administrator, defendant in error.

The issue in this case being one to be determined by the evidence, and the whole question having been submitted to the Judge, we see nothing that calls for a reversal of his decision.

New trial. Discretion. Before Judge HILL. Bibb Superior Court. April Term, 1873.

At the May term, 1870, of Bibb Superior Court, Nussbaum & Dannenberg, by their attorney at law, Henry W. Cowles, obtained a judgment against Albert B. Ross, as administrator upon the estate of John P. Lamar, deceased, for \$183 57, principal, and \$42 61, interest. The execution based upon this judgment was levied upon a lot of land as the property of the intestate. The administrator filed an affidavit of illegality setting up payment. The issue thus formed was submitted to the Court, without the intervention of a jury, upon the following statement of facts:

Some time after the aforesaid execution was issued, Cowles, plaintiffs' attorney, called on Ross, administrator, for payment, or part payment thereof. The administrator stated that he had no funds, but that J. Rutherford, Esq., the attorney for the estate, had in his hands an execution secured by a pledge of cotton, out of the proceeds of which plaintiffs' *fi. fa.* should be paid. Also, that if he, Cowles, could get any person to advance the money on the *fi. fa.* he, Ross, would pay back the same to whoever controlled said process. Cowles applied to William P. Goodall, repeating to him the aforesaid statement of Ross, and assuring him that such advance would not only accommodate him but also the administrator. Goodall called on the administrator, who stated to him, substantially, what he had previously said to Cowles. The administrator, in saying what he did to Cowles and Goodall, believed that Goodall would be perfectly safe in advancing the money under the circumstances. Goodall did advance the principal and interest due on said execution.

McCamy vs. Higdon *et al.*

The Court sustained the affidavit of illegality, and plaintiffs in execution excepted.

POE & HALL, for plaintiffs in error.

J. RUTHERFORD, for defendant.

TRIPPE, Judge.

The whole question in this case, to-wit: whether the execution was paid or not, was submitted to the Judge, and that being a matter to be determined by the evidence, we see nothing that demands of us a reversal of his decision.

Judgment affirmed.

ROBERT J. McCAMY, administrator, plaintiff in error, *vs.*
SAMUEL HIGDON *et al.*, defendants in error.

1. A deed purporting upon its face to have been made by the guardian of a minor, under the authority of a decree of the Superior Court, is inadmissible in evidence without the production of said decree.
2. The fact that the prescriptive title sought to be established is based upon a quit-claim deed, as color of title, does not of itself negative the presumption of good faith.
3. Where the evidence disclosed that the defendants' vendor was a mere squatter, and had no title to the land in controversy; that the defendants had knowledge of this fact before and at the time of the execution of the deed to them, and before and at the time of the commencement of their possession of the land under it, then no prescription could have been based thereon.

Evidence. Deed. Prescription. Before Judge KNIGHT.
Fannin Superior Court. May Term, 1873.

As a part of the plaintiff's claim of title, he tendered in evidence a quit-claim deed to an undivided fourth interest in the property in dispute, executed on January 21, 1855, by Daniel P. Barnard, as guardian of Charlotte E. K. Prindle, reciting upon its face to have been made in pursuance of the

McCamy vs. Higdon et al.

provisions of a decree rendered at "the last October term" of Whitfield Superior Court, to Samuel M. Street, plaintiff's intestate.

This deed was objected to, upon the ground that the decree under which it was executed had not been produced. The objection was sustained, and plaintiff excepted.

The remaining facts are set forth in the decision.

E. W. CHASTAIN; C. J. WELLBORN, by R. J. McCAMY, for plaintiff in error.

J. A. JERVIS; THOMAS F. GREER; W. T. DAY, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, under the provisions of the statute, to recover the possession of lot of land number one hundred and ninety, in the ninth district of Fannin county. On the trial of the case, the jury, under the charge of the Court, found a verdict for the defendants. A motion was made for a new trial, on the several grounds contained therein, which was overruled by the Court, and the plaintiff excepted.

There were only two grounds of error seriously urged before this Court, embraced in the motion: First, as to requiring the production of the decree of the Superior Court of Whitfield county, which was recited in one of the plaintiff's deeds, ordering a sale of the land; and, second, as to the qualification of the charge, as requested by the plaintiff, in view of the facts of the case.

1. There was no error in requiring the production of the decree under which the land was ordered to be sold. The recital thereof in the deed did not dispense with its production at the trial.

2. The defendants purchased the lot of land from Millsaps, who made to them a quit-claim deed, under which the defendants went into possession of the land, claiming it as their

own, and had been in possession thereof more than seven years next before the commencement of the plaintiff's action. The plaintiff requested the Court to charge the jury, "Where the defendants rely on a quit-claim deed as a color of title, they must show by proof that they bought in good faith, claiming the whole lot, and believing that they were getting a good title. The presumption of good faith does not arise where the color of title is a quit-claim deed, but the presumption is, that they knew they were getting only what they actually got." The Court gave this request in charge to the jury, with the following addition; "that if the defendants bought from one in adverse possession of the land, and had held it for over seven years under color of title, the jury should find for the defendants." In view of the evidence disclosed in the record, there was no error in the charge of the Court of which the plaintiff has a right to complain. If the defendants purchased the land in good faith from Millsaps, and took from him a deed conveying the land to them without warranty, that circumstance alone would not negative the presumption of good faith, and the Court properly gave the additional charge. Adverse possession of lands, under written evidence of title for seven years, shall give a title by prescription. But if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon: Code, section 2641. A deed without warranty, as in this case, is written evidence of title, and in the absence of proof to the contrary, the presumption is, that the party claiming possession under it does so in good faith.

3. But if the evidence had shown that Millsaps, from whom the defendants purchased, was a mere squatter on the land, and had no other title to it, and that the defendants had knowledge of that fact before and at the time of the execution of his deed to them, and before and at the time of the commencement of their possession of the land under it, then no prescription could have been based thereon, for the reason

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that they would have had no better prescriptive title as against the true owner of the land than the squatter from whom they purchased it. If the squatter's written title to the land be forged, or fraudulent, and notice thereof be brought home to the claimant who has purchased from him before or at the time of the commencement of his possession, no prescription as against the true owner of the land can be based thereon, under the statute. There was no error in overruling the motion for a new trial, on the statement of facts disclosed in the record.

Let the judgment of the Court below be affirmed.

JULIA A. McLAREN, administratrix, plaintiff in error, vs.
EUGENIA A. BEALL, defendant in error.

1. When a judgment was obtained against one as administrator of an estate, and the subsequent representative of the same estate filed an affidavit of illegality against the execution issued on such judgment, on the ground that the defendant in execution was not the legal administrator at the date of the judgment or since, the affidavit should set forth the facts which show that the title of such defendant to the office of administrator was illegal.
 2. A ground taken in an affidavit of illegality that the execution "issued upon a *bogus* judgment, which was not obtained after a due course of law, but was obtained in chambers, contrary to the statute in such cases made and provided, and by fraud," is too general and indefinite, and does not show that the judgment is void, and therefore cannot be inquired into in a proceeding by illegality.
 3. On a trial of an affidavit of illegality the affiant, in support of one of the grounds taken, introduced the former administrator as a witness, and who testified that he had paid \$3.400 00 on the debt, and that no credit had been given for it. Upon the attention of the witness being called to the original decree, and papers connected therewith, he admitted that he was mistaken:
- Held*, That notwithstanding the witness admitted the mistake on the trial, yet his being willing so to testify furnished a reason for filing the affidavit sufficient to relieve a succeeding representative from the charge of interposing it for delay only, and especially under such a state of facts, twenty per cent. damages should not have been given.

McLaren vs. Beall.

Illegality. Administrators and executors. Damages. Before Judge STROZER. Dougherty Superior Court. April Adjourned Term, 1873.

An execution in favor of Eugenia A. Beall against Peter McLaren, as administrator upon the estate of Davis Pace, deceased, for \$22,423 01, principal, with interest from April 1st, 1868, was levied upon certain lands and personalty as the property of said estate. Julia A. McLaren, as administratrix upon said estate, filed an affidavit of illegality upon the following grounds, to-wit:

1st. Because the debt sued on was contracted prior to June 1st, 1865, and no taxes have been paid thereon as required by the Act of October 13th, 1870.

2d. Because the execution "issued upon a *bogus* judgment, which was not obtained after due course of law, but was obtained at chambers, contrary to the statute in such cases made and provided, and by fraud."

3d. Because a large portion of the debt has been paid since the judgment, to-wit: \$3,000 00, which amount has not been credited on the execution.

4th. Because Peter McLaren, against whom the judgment was obtained, as administrator upon the estate of Davis Pace, deceased, was not, at the time of the rendition of such judgment, a legal administrator of said estate, and never has been.

Upon demurrer, the second and fourth grounds of illegality were stricken, and the defendant accepted.

On the trial of the issue thus formed, Peter McLaren testified to the payment of \$3,400 00, which should be credited on the execution.

Upon cross-examination, plaintiff's counsel exhibited to the witness the original decree and statement of guardian's account upon which the same was made, showing that the credit alluded to had been deducted. Witness then stated that the proper credit had been allowed, and he was satisfied, but that he had been, until shown the aforesaid papers, under

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the impression that said payment should have been credited on the execution.

The jury found for the plaintiff, with twenty per cent. damages. The defendant moved for a new trial, because of error in sustaining the aforesaid demurrer, and because the verdict was contrary to the evidence. The motion was overruled, and defendant excepted.

H. MORGAN ; VASON & DAVIS, for plaintiff in error.

WRIGHT & WARREN, for defendant.

TRIPPE, Judge.

1. The affidavit of illegality in its recitals or statements, before the specific grounds were set forth, showed that Peter McLaren, against whom the judgment was obtained, as administrator of Davis Pace, was sued as such, had acted as administrator, and was acting administrator at the time the judgment was obtained. The ground then taken is merely that he was not a legal administrator. When a judgment is thus obtained against one who it was admitted was filling the office of an administrator, and who, in fact, was an administrator, it is not sufficient to state in the affidavit of illegality, whereby the judgment is sought to be arrested, or set aside, that such person was not a *legal* administrator. An issuable statement should have been made; that is, it should have been set forth, wherein consisted the illegality of his appointment. Notice should be given by the pleadings to the plaintiff of what the affiant intended to rely on to show that the judgment was not a judgment against the estate, and what it was that thus made the representative who had been sued an illegal representative. The affidavit does not state that there had been any judgment vacating the title of the administrator, or declaring his right to the office void.

2. The same may be said of the other grounds, to-wit: that the "execution issued upon a *bogus* judgment, which was not obtained after a due course of law, but was obtained in cham-

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bers, contrary to the statute in such cases made and provided, and by fraud." This is too general and indefinite. It does not show that the judgment is void, and the facts that make it so. As to there being no right to attack the validity of a judgment by illegality. See 7 *Georgia*, 204; 8 *Ibid.*, 143; 11 *Ibid.*, 137; 22 *Ibid.*, 570. The demurrer to both these grounds was properly sustained.

3. The jury gave twenty per cent. damages to the plaintiff. Was this right under the evidence? Waiving the question whether damages can be given against an administrator in an issue formed on an affidavit of illegality, we do not think the damages in this case can be sustained under the testimony. The third ground in the affidavit is, that \$3,000 00 had been paid on the debt since the judgment, and no credit given therefor. Peter McLaren, the former administrator, on his direct examination, testified that he had paid that amount on the debt, and supposed the *fi. fa.* ought to be credited with it, but it was not. It is true that on his cross-examination, upon being shown the original decree and the statement of the account on which it was founded, it appeared that the credit had been allowed before the decree was taken, and the witness then admitted that fact. He also stated that up to that time he believed that the payment he made ought to have been credited on the execution. Here, then, was an administratrix who set up that a large payment on a judgment had been made by her predecessor in the administration, and the fact was sworn to by the former administrator. He admitted on the trial, after he had so testified, that he was mistaken, but had just then discovered it. This was sufficient to relieve the affiant, the then representative of the estate, from the charge of having interposed the illegality for delay only.

Judgment reversed.

CHARLES KELLY, relator, vs. JOHN I. HALL, Judge, respondent.

It would require a very strong case to authorize this Court to grant a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to its judgment in overruling a second motion for a new trial, after the case had been heard before this Court and a new trial refused.

Practice before the Supreme Court. *Mandamus*. New trial. Bill of exceptions. Before the Supreme Court. January Term, 1874.

Charles Kelly petitioned the Supreme Court for a *mandamus nisi* requiring Honorable John I. Hall, Judge of the Superior Courts of the Flint Circuit, to show cause why he should not be compelled by a rule absolute to sign and certify a bill of exceptions to his judgment refusing a new trial in the case of the State against petitioner, who was charged with the offense of murder.

It appeared from the petition that Kelly was convicted of the offense of murder at the September adjourned term, 1872, of Newton Superior Court; that a motion for a new trial was made and overruled, and that said judgment was affirmed by the Supreme Court; that, at the September adjourned term, 1873, a second motion was made for a new trial, on the ground that Hulbert Brown, a material witness for the State, since the trial, had made an affidavit to facts differing from his testimony given in from the stand, and tending to sustain the *alibi* relied upon by petitioner, and because of certain irregularities in the conduct of the jury.

The motion was overruled. A bill of exceptions to this judgment was presented to the presiding Judge, who returned it, with the following entry thereon:

"My signature and certificate to the within bill of exceptions is refused, this being the second motion for a new trial in the case, and the evidence herein contained showing plainly that no harm could possibly have resulted to the defendant from the irregularities complained of."

Andrews & Company vs. The Gwinnett Manufacturing Company *et al*,

A. M. SPEER; J. J. FLOYD, for the relator.

No appearance for respondent.

WARNER, Chief Justice.

This is an application for a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to the judgment of that Court in overruling a second motion for a new trial. The granting or refusing the *mandamus* prayed for must necessarily rest in the sound legal discretion of this Court: *Harris vs. The State*, 2 *Kelly's Reports*, 290; *Malone vs. The State*, decided at the last term. It would require a very strong case, indeed, to authorize this Court to grant a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to its judgment in overruling a second motion for a new trial after the case has been heard before this Court and a new trial refused—much stronger than the one made by the facts alleged in this application.

Let the judgment refusing the application be entered on the minutes of the Court.

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JAMES W. ANDREWS & COMPANY, plaintiffs in error, vs.

THE GWINNETT MANUFACTURING COMPANY *et al*., defendants in error.

The stockholders in the Gwinnett Manufacturing Company may be joined as defendants in an action by a creditor against the corporation. As they are liable for the debts of the company in proportion to the stock severally held by them, the pleadings should show the proportion. If the plaintiff has omitted to set out the amounts in the original pleadings, he can amend so as to insert them. Proceedings in this form would not affect the right of the stockholder, under the charter, to require any judgment thus obtained to be first enforced against the property of the company.

Corporations. Stockholders. Pleadings. Before Judge RICE. Gwinnett Superior Court. September Term, 1873.

Andrews & Company vs. The Gwinnett Manufacturing Company et al.

Andrews & Company brought complaint against the Gwinnett Manufacturing Company, and certain stockholders in said company, on an account for \$378 49.

The charter, Act of 1858, pages 69, 70, contains (section 3,) personal liability clause, and also (section 4,) a provision for requiring the president to furnish a list of stockholders when called on.

At the trial, the stockholders moved to dismiss as to them, on the ground that their liability was not primary but secondary, and the Court sustained the motion, and plaintiffs excepted. Plaintiffs then moved to amend the declaration so as to aver that there was no individual in office on whom this notice could have been served, so as to obtain the list of stockholders, and to set out in detail the names of the stockholders at the time the debt was created, and amount of stock held by each, and offered to ascertain and supply by proof the facts which would have appeared in the president's schedule, if accessible and truthfully made. This motion the Court overruled, holding that the stockholders could only be proceeded against in the manner pointed out in the charter, and that the remedy there given to the creditors is specific and not merely cumulative, and dismissed the action as to the stockholders. To which ruling plaintiffs excepted.

N. L. HUTCHINS; HILLYER & BROTHER, for plaintiffs in error.

1st. Both the "right and the remedy" are fully given by the 3d section of the charter. The 4th section is merely for convenience and in cumulation of the common law: *R. R. Co. vs. Carr*, 1 Kelly, 524; *Wallace vs. Cason*, 42 Ga., 435; Code, sec. 3376.

2d. The declaration in present form sufficient: *Cameron vs. Moore and wife*, 10 Ga., 368.

3d. But if not, then clearly the amendments proposed by the plaintiffs were sufficient to retain the case. If the plaintiffs could not obtain the list of stockholders on notice from

Andrews & Company vs. The Gwinnett Manufacturing Company *et al.*

the president, the plaintiffs' rights were not thereby lost. It was not the placing of their name on this list which made the stockholders liable. They were liable before, and the schedule or list of names was merely for convenience; and the plaintiffs were entitled to aver and prove that they could not get the names by notice, and then go on and show that the defendants, Camp, and Camp, as administrator, and Simmons, all of whom were regularly served, were stockholders, and what was the liability of each. The degree, order and comparative liability of the defendants amongst themselves could be no bar to the action. If the liability existed, the right of action existed, and the judgment would be moulded so as to fix the rights of each defendant amongst themselves: Code, secs. 3251, 2243, 3082, 3250, 2165, 2166.

JAMES P. SIMMONS, for defendants in error.

1st. Under the charter, the individual liability of the stockholders is *secondary* and not *primary*, and that they cannot be sued jointly with the corporation, except as provided therein: Acts of 1858, pp. 69, 70; 14 Barb., 559.

2d. If liable to suit otherwise than as provided in the charter, the stockholders cannot be sued until judgment and *fi. fa.* against the corporation, and a return of *nulla bona* thereon: 11 Ga., 514, 515.

3d. When stockholders in a corporation are made liable to a limited extent, and a specific and sufficient remedy is provided in the charter, whereby the amount for which each is liable may be easily ascertained and their liability speedily enforced, they cannot, at common law, be proceeded against in any other way. The charter cannot be altered without their consent: 6 Ga., 131, 156; 11 *Ibid.*, 438; 14 *Ibid.*, 334; 8 *Ibid.*, 527, 468; 19 *Ibid.*, 325. ("Measured by the charter—a contract.") Ang. & Ames on Cor., p. 801, sec. 767; 14 Wheat., 518; 11 Ga., 483.

TRIPPE, Judge.

It is true, that by the charter of the Gwinnett Manufacturing Company, the judgment obtained on a debt due by the corporation is first to be levied on the corporate property. But it is specially provided that the stockholders may be made parties to the suit, at least that the president of the company shall, upon notice, file, at the first term, a schedule showing the names of all the stockholders and the amount of stock held by each. When judgment is obtained it is the duty of the clerk to indorse on the execution a copy of said schedule, which is the guide to the levying officer in the collection of the same. The effect of this is to make the stockholders primarily liable to be sued, liable to have judgment rendered against them in proportion to their stock, although the corporate property is first to be levied on.

If the particular mode allowed by the charter is the only one by which a creditor can reach the stockholder, then, as in this case, if the president is unable to furnish the schedule, all remedy is gone. The charter expressly declares the stockholders to be "bound and liable for the payment of all the debts of the company in proportion to the amount of stock owned by each at the time the debt was contracted." It is a declaration of joint liability, to-wit: of the corporation and of the stockholders, and one method is given whereby it can be enforced. If that remedy is impracticable on account of the inability of the chief officer of the company, the right of the creditor still exists, and if a right then there must be a remedy. Indeed, if a liability exists on the part of the stockholders jointly with the corporation, and the levying of the execution on the property of the stockholders, is merely postponed until the corporate property is first taken, a right of action against both jointly exists in the creditor, and if the charter gives him some additional mode whereby he may enforce his right, it is a cumulative and not exclusive remedy, unless so declared, or is to be so construed by necessary implication: 42 *Georgia*, 435; 1 *Kelly*, 524; Code, section 3376.

It is not the placing of the names on the schedule to be returned by the president, nor on the execution by the clerk, that makes the stockholders liable. They were liable before, by the charter, and that was only a means of ascertaining who they are, and the amount or proportion of their liability. The plaintiff proposes to do this himself, to furnish the names of the stockholders and the amount of their stock, and to make them parties directly to the suit. There is no reason why he should not be allowed to do this if he choose to take the burden, and especially is it his right, if it be his only means of enforcing his claim. Of course, when a plaintiff elects or is forced so to proceed, he must set forth whatever is necessary to show the proportion of each stockholder's liability who is made a party. Amendments for that purpose, when necessary and proper, can be made. When the proceedings are thus adopted by the creditor, the right of the stockholders to require the judgment to be first enforced against the corporate property remains unaffected.

Judgment reversed.

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LITTLETON PHIPPS, plaintiff in error, vs. EUBANKS TOMPKINS *et al.*, defendants in error.

1. An exception to an award relating to the testimony will not be considered in this Court, where the evidence is not in the record, and does not appear to have been exhibited to the Court below.
2. Where pending litigation, by consent, was, by an order of Court, referred to the decision of three arbitrators, two of them being named, they to select a third, and the questions at issue were heard before the two arbitrators named, who made an award, it is incumbent on the party excepting to the award, on the ground that the matters in dispute were not heard before three arbitrators, to negative all presumptions in favor of the award, by alleging either that he was not present when the award was made, and was not heard before the two arbitrators, or that he objected at the time to proceeding before them.

Award. Exceptions. Waiver. Before Judge STROZER. Baker Superior Court. May Term, 1873.

Phipps vs. Tompkins et al.

For the facts of this case, see the decision.

B. B. BOWER; GURLEY & RUSSELL, for plaintiff in error.

SMITH & JONES; G. J. WRIGHT, for defendants.

WARNER, Chief Justice.

It appears from the record in this case that there were suits pending in the Superior Courts of Baker and Dougherty counties between Eubanks Tompkins, Cook & Son and Phipps, and Phipps and Tompkins, and for the purpose of satisfactorily adjusting the differences in dispute between them, the parties agreed to submit the same to Richard F. Lyon and John A. Davis, as arbitrators, who should select a third person as arbitrator to act with them, said arbitrators to meet at Albany, on the 8th day of June, 1870, for the purpose of passing upon said points in dispute, and that said trial should be conclusive, as provided by Irwin's Code for trials by arbitration, and that the award of said arbitrators be made the judgment of the Court of Baker county. At the May term of Baker Superior Court, 1870, an order was passed ordering that the matters in dispute, under said agreement of the parties, be referred to the arbitrators named, under the arbitration laws of this State, and that they make an early report to this Court. Under this order of reference, Lyon and Davis, two of the arbitrators named, made an award and returned the same, which was entered on the minutes of Baker Superior Court. Phipps, by his counsel, objected to said award being made the judgment of the Court, and moved to set it aside, on the ground that the award was made by an arbitration composed of two members instead of three, and because the arbitrators did not pursue and comply with the terms of the submission, in this, that it was agreed that three should compose the arbitration; whereas, only two presided.

1. There was also another objection filed, by way of amendment, relating to the evidence before the arbitrators, but as the evidence is not in the record and does not appear to have

been exhibited to the Court below, it will not be considered here.

2. On hearing the objections to making the award of the arbitrators the judgment of the Court, the same were overruled, and the counsel for Phipps excepted. Were the objections filed to making the award of the arbitrators the judgment of the Court, sufficient in law, under the facts of this case? The questions in dispute between the parties were referred by the Court, in accordance with their agreement, and it is quite certain that the arbitration was had before the two arbitrators who made the award. The objecting party does not allege that this was done without his knowledge or consent, or that he was not present and heard before the two arbitrators who made the award, and if he did consent that the two arbitrators should make the award, or was present and heard before them without objecting that the third man was not there, it was too late to object to the award for that reason after the award was made. It was, therefore, incumbent on him, when he filed his objections to the award, to have negatived all presumptions in favor of the award by alleging either that he was not present when the award was made, and was not heard before the two arbitrators, or that he objected at the time to the two arbitrators hearing the case; for it is a fair presumption, we think, that the two arbitrators would not have proceeded to have heard the case under the order of the Court unless the presence of the other arbitrator had been waived by the parties, either expressly or by tacitly submitting the case to the decision of the two. There can be no question that the award of the two arbitrators, made by the consent of the parties, would be a valid award, although the order of reference contemplated three; or, if the parties submitted their case to the two arbitrators, and were heard before them without objection by either of the parties at the time of the hearing that the third arbitrator was not present. The right of the parties to have had their case submitted to three arbitrators under the order of reference is one thing; the waiver of that right, and consenting that two only should

hear and decide the questions submitted, is another and different thing, and when an award has been made by two, the party seeking to set it aside for that reason should clearly negative, in his alleged objections to it, that he did not waive any of his rights by consenting to, or participating in, the hearing of the questions submitted before the two arbitrators who made the award. If the party objecting did, in fact, go before the two arbitrators and submit his case to their decision without objection, and was fully heard before them, or consented that the two should hear and decide it, then he should not be heard to object to the award because it was made by two arbitrators only. This was not an arbitration had under the special provisions of the Code providing for a statutory arbitration, but was an arbitration had under an order of the Court referring pending litigation therein to arbitration, and when a party seeks to get rid of the award, he will be required to allege such objections to it as will be sufficient in law to have the award set aside, which was not done in this case.

Let the judgment of the Court below be affirmed.

GROOVER, STUBBS & COMPANY, plaintiffs in error, vs. WARFIELD & WAYNE, defendants in error.

[McCay, Judge, was providentially prevented from presiding in this case.]

1. A sale and delivery of cotton for cash to the amount of \$50 00 or more, with a "sale ticket" or memorandum in writing, signed by the seller, is a contract binding on the buyer, under section 1950, Code, and the vendor can recover damages from the purchaser for the breach thereof in returning the cotton and refusing to pay for the same, notwithstanding, under section 1593, the cotton, by reason of the non-payment, did not become the property of the buyer, nor the ownership thereof given up.
2. Under said section 1950, a sale of cotton to the amount of \$50 00 or more, without any memorandum signed by the buyer or by some person by him lawfully authorized, or an acceptance and actual receipt of the cotton, or part thereof by him, and where nothing is given in

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earnest to bind the bargain, or in part payment, is not binding on the buyer.

3. Cotton factors can, in their own names, recover all the damages resulting from a breach of contract by the buyer of cotton from them, although they may be bound to pay the same, when recovered, to their consignors.
4. The measure of damage in such a case is the difference between the contract price for the cotton and the value thereof on the day of the breach.
5. As the jury did find, on the facts of the case, in favor of the plaintiffs, so far as to give them nominal damages, and as we are of opinion that they were probably misled by the charge of the Court on this point, and by the further charge limiting the right of recovery "to the amount of damages actually sustained by the plaintiffs themselves," when it appeared in evidence that the damages recoverable would enure to the benefit of plaintiffs' consignors, we think that a new trial should be granted.

Statute of frauds. Part performance. Factors. Damages. Before J. R. SAUSSEY, Esq., Judge *pro hac vice*. City Court of Savannah. May Term, 1873.

Groover, Stubbs & Company brought assumpsit against Warfield & Wayne for \$1,000 00 damages, alleging, in substance, as follows: That on the 11th, 12th and 14th days of April, 1873, they sold to defendants two hundred and twenty-five bales of cotton, to-wit: sixty-seven bales on the 11th, eighty-six on the 12th, and seventy-two on the 14th, at prices ranging from sixteen to eighteen and a half cents per pound; that within a reasonable time after the dates of the sales they delivered to defendants seventy-two bales, fifty-eight bales of which were sold to them on the 11th of April, and fourteen bales on the 14th; that within a reasonable time they tendered to the defendants the remaining number of bales purchased by them; that the defendants, after having received said seventy-two bales, refused to keep and pay for the same and returned them to the plaintiffs; that they refused to receive and pay for the remainder of the two hundred and twenty-five bales purchased by them; that the price and value of cotton declined materially between the dates of these sales and the time of the breaches of the contracts by the defend-

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ant, causing damage to the plaintiffs to the amount of \$1,000. Pray process.

The defendants pleaded the statute of frauds.

The evidence established the allegations contained in the declaration. The only written evidence of the sale were various sale tickets or memoranda, which described the cotton sold by marks, and stated the prices, signed by the plaintiffs. As a specimen, the following is attached :

“SAVANNAH, GEORGIA, April 11th, 1873.

“Sold to Warfield & Wayne, on the following conditions, viz :

“No reclamation will be allowed by us on any cotton, unless the difference of qualities in any one bale is to the extent of one full grade ; and even in such case, no reclamation to be allowed unless claimed on delivery of the cotton :

R J S.....	1 bale cotton.....	at 17 cents.
H (in half diamond).....	8 bales cotton.....	at 17 cents.
N x H.....	14 bales cotton.....	at 17 cents.
N I X.....	18 bales cotton.....	at 18½ cents.
F		
E x O	2 bales cotton.....	at 18½ cents.
F (in a diamond)		
E S E.....	2 bales cotton.....	at 18½ cents.
B P	2 bales cotton.....	at 18½ cents.
S	2 bales cotton.....	at 18½ cents.
J W M.....	2 bales cotton.....	at 18½ cents.
M K (in a square).....	1 bale cotton.....	at 18½ cents.
J T R.....	1 bale cotton.....	at 18½ cents.
B P.....	1 bale cotton	at 18½ cents.
G S.....	1 bale cotton... ..	at 18½ cents.
J C S.....	4 bales cotton.....	at 18½ cents.
B (in a diamond)	1 bale cotton.....	at 18½ cents.
J T	1 bale cotton.....	at 18½ cents.
T	1 bale cotton.....	at 18½ cents.
S x D.....	4 bales cotton.....	at 18½ cents.
P V.....	1 bale cotton.....	at 18½ cents.
W (in a square).....	1 bale cotton.....	at 18½ cents.
G E O.....	1 bale cotton.....	at 18½ cents.

66 bales cotton.

“GROOVER, STUBBS & COMPANY.”

The seventy-two bales which were delivered to the defendants, the plaintiffs were compelled to take back, as they would not pay for them. Plaintiffs notified the defendants that they would sell the cotton on their account, and hold them responsible for the loss. They finally demanded the purchase price of the cotton on the 18th of April, and on the refusal of the defendants to pay, gave the above notice. The defendants gave to plaintiffs' cashier an order for the seventy-two bales on the 15th, which he received subject to the approval of his principals. Matters thus stood until the 18th. Cotton had, in the meantime, declined fully one-half cent per pound. The weights of the bales were shown, but unnecessary here to be set forth. The cotton was consigned to the plaintiffs for sale. At the time of the purchase by the defendants the various consignors were notified. They were also informed of the subsequent action of the defendants in the premises, and that it was the intention of the plaintiffs to institute suit for the damages sustained therefrom, and that they should receive their *pro rata* share of the recovery. The cotton was sold by sample, which were delivered to the defendants.

Other issues were made by the pleadings and evidence, not material to be herein embraced.

The Court charged the jury, among other things, as follows:

1st. That the sale tickets of the 12th and 14th of April, not being signed by the defendants, nor by any one by them lawfully authorized, are not sufficient memoranda in writing to take this case out of the statute of frauds.

2d. That the plaintiffs themselves must actually have sustained damages in order to recover.

3d. That the measure of damages in this case will be the difference between the contract price of the cotton and the price on the day of the breach.

To each of the aforesaid charges plaintiffs excepted.

The jury found for the plaintiffs \$19 33. They assign error upon the above grounds of exception.

HOWELL & DENMARK, for plaintiffs in error.

1st. The action is properly brought. Plaintiffs in error have a right of action on these contracts; because,

(a) They are factors, contracting on their own credit.

(b) The contracts are made with them in their individual names. (The Court charged that the plaintiffs themselves must actually have sustained damages in order to recover:) Code, sec. 2209, par. 1, 3; 12 Ga., 578; Story on Agency, secs. 112, 393, 396, and references; 2 Par. on Cont., 2d Ed., 84, and references; 4 Mass., 257; Smith on Mer. Law, 209.

(c) As between factor and vendee, the former is sole owner of the goods: 1 Cowen, 645.

(d) For every legal right there is a legal remedy: Code, secs. 2243, 3250; 4 Ga., 264.

2d. Statute of frauds.

(a) The memoranda in writing, though not signed by the defendants, nor by any one by them lawfully authorized, are sufficient to take the contracts out of the statute of frauds, because the defendants accepted them as evidences of the contracts. (The Court below refused so to charge:) 1 Ga., 220; 25 *Ibid.*, 391; 6 Cowen, 448, and cases cited; 17 Barb., 613; 2 Caine's, 117; Vol. 1., Book 2, Chitty's Blackstone, 448, note 15; 14 Howard, 456.

(b) If memoranda in writing are not sufficient to take the contracts out of the statute of frauds, the acceptance and actual receipt by the defendants of a part of the cotton sold are sufficient: Code, sec. 1950, par. 7.

(c) Further, there has been performance on one side. Side of plaintiffs accepted by the defendants, in accordance with the contracts: Code, sec. 1951, par. 2.

(d) Again, there has been such part performance of the contracts by the plaintiffs as would render it a fraud of defendants' refusing to comply: Code, sec. 1951, par. 3; 6 Ga., 623; 14 *Ibid.*, 685; 30 *Ibid.*, 98; 41 *Ibid.*, 71, 75.

3d. Measure of damages. The Court charged that "the measure of damages would be the difference between the con-

tract price of the cotton and the price on the day of the breach."

(a) Under the facts of this case, the proper measure of damages is the actual loss on the resale of the cotton: Code, sec. 2940; Sedgwick on Meas. Dam., marg. p. 281, and notes; 3 Par. on Cont., 5th Ed., 155, 209.

4th. Verdict is contrary to the law and the evidence.

(a) Damages are given as compensation for the injury sustained: Code, sec. 2940; 3 Par. on Cont., 155.

(b) Where there are rules by which damages may be measured, the value of which may be ascertained by evidence, a new trial will be awarded if the finding be contrary to the evidence: 7 Ga., 204; 10 *Ibid.*, 37.

(c) Does the evidence sustain the verdict? 4 Ga., 193, 438, 439; 21 *Ibid.*, 69; 22 *Ibid.*, 103, 582; 24 *Ibid.*, 591; 34 *Ibid.*, 328.

5th. Verdict contrary to the charge of the Court as to measure of damages: 9 Ga., 408; 7 *Ibid.*, 204; 10 *Ibid.*, 37.

6th. Charge of the Court calculated to mislead the jury: 12 Ga., 100; 15 *Ibid.*, 258; 19 *Ibid.*, 335; 25 *Ibid.*, 184; 30 *Ibid.*, 241.

7th. Verdict is so small as to justify the inference of gross mistake or undue bias, hence Court should interfere: Code, sec. 2947; 41 Ga., 76.

W. J. GARRARD, for defendants.

1st. If the charge was right as to "measure of damages," the hypothesis is reasonable that the jury, by this verdict, gave nominal damages, because the evidence furnishes them no *data* upon which to ground a verdict for real damages: Was the charge on this point correct? We say it was: Benjamin on Sales, 618; and this is measure of damages claimed in the declaration. As to the emphasis sought to be put upon the word "*themselves*," by plaintiffs, reference to the charge in its entirety shows that the jury could have been deluded by no such distinction, and that no such exists therein. No plea

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was filed against right of plaintiffs to sue herein as "*factors*," it was, and is, admitted they could do so.

2d. Verdict should have been for defendants; there was no sale proven; there was no memorandum "signed by defendants," etc.: See Code, section 1950; Browne on Frauds, sections 365, 366, 367, 369; Smith on Mercantile Law, 618; Benjamin on Sales, 169, 188, 198; Williams on Personal Property, 36, 40; Phillips on Evidence, vol. 3, p. 352; Linton & Company *vs.* Williams, 25 Ga., 395.

3d. "Part performance" is relied on, however. This is a suit on many small contracts, so called. The seventy-two bales delivered could not bind as to the one hundred and fifty-three not delivered, because it was not a lumping sale; each "lot of cotton" stood for itself. This was a series of *cash* sales. As to the seventy-two bales delivered, the exception to the statute was not satisfied, because the *title* remained in the vendors: Code, sections 1589, 1590. "The cotton was not our property, nor was ownership of vendors given up:" Browne on Frauds, sections 316, 317, 321, 322, 325; Smith's Mercantile Law, 612, and cases cited; Phillips on Evidence, vol. 3, p. 366; Benjamin on Sales, 131, 134, 140, 141; 47 Barbour's Reports, 556; 42 *Ibid.*, 73.

4th. Equally upon the strength of the above authorities, section 1951 of Code does not apply; the "title" did not pass out of vendors, the plaintiffs.

5th. This case comes up by "writ of error," no motion for "new trial" having been made. Evidence cannot be considered: See *Crim vs. Sellars*, 37 Ga., 326; *McCrary vs. Perry*, 40 *Ibid.*, 256; *Whitlock vs. Gains*, 28 *Ibid.*, 26; *Tate vs. State of Georgia*, 48 *Ibid.*, 37. This Court cannot grant a new trial; it can affirm or reverse the judgment: See Code, section 218. It has granted a "new trial" on the other power stated in said section: See *Wynn vs. Smith*, 40 Ga., 458; but therein a new trial had been moved for.

TRIPPE, Judge.

1. Section 1950, Code, paragraphs 1 and 7, is but a reproduction of the 17th section of the statute of frauds, in so far as it applies to this case. The 7th paragraph of the section makes the contract binding when "the buyer shall accept part of the goods sold, and actually receive the same." In this case there were three distinct sales of cotton, to-wit: on the 11th, 12th and 14th days of April, 1873. That sold on the 11th, and part of what was sold on the 14th, were accepted by the buyers and actually received by them. The reply made to this is, that as the cotton was sold for cash, and as, by section 1593, Code, it "shall not be considered as the property of the buyer, or the ownership given up until the same shall be fully paid for, although it may have been delivered into the possession of the buyer," the conditions of the statute of frauds were not complied with, and plaintiffs cannot recover. It is not necessary to notice at large the point involved in this position. It might be sufficient to say that this is not an action for goods sold and delivered, when it might become necessary for the seller so to part with the dominion of the goods sold as to make them the property of the buyer, but it is a suit for damages for a breach of contract. Such an action may often be sustained and meet the demands of the statute, where one for goods sold and delivered could not be. But we do not think the section quoted (1593) has any such effect as is claimed for it. It was simply intended to protect the owner of cotton and other products against fraudulent purchasers; for the next section makes it penal for the purchaser to dispose of such commodities without paying for them. It surely, whilst passed for the benefit of the owner, could not have been meant to give power to a purchaser to buy, accept and receive such products and then refuse to execute the bargain by paying for them, on the ground that they were not his property, and when they were not his, merely because he had not paid for them. This guaranty or protection, secured by special statute to the owners of such articles, never was

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designed to affect any rights they had as sellers, under section 1951; nor do we think it touches the construction to be given to that section. If the buyers accepted the cotton sold at any one or more of the sales, or part thereof, and actually received the same, they were bound by the contracts under which the receipts and acceptances were made, and were liable in damages for refusing to perform such contracts.

2. But if, under any of the contracts of sale, there was no memorandum, or in the language of section 1950, no "promise" was signed by the parties to be charged therewith, and no acceptance and actual receipt of the cotton, or part thereof, by them, and no earnest or part payment, the buyers were not bound by that contract. Plaintiffs claim that the "sale tickets" made out by themselves of the sale made on the 12th of April, were sufficient to meet the demand of the statute, although there was no acceptance and actual receipt of the whole or part of the cotton by defendants. It has been heretofore stated that the section 1950 of the Code, so far as it applies to this case, was but a reproduction of the 17th section of the statute of frauds. The latter requires "that *some note or memorandum in writing of the said bargain* be made and signed by the *parties* to be charged by such contract," etc. The former, in order to make the contract "binding on the promisor," provides that "*the promise* must be in writing, signed by the *party* to be charged therewith." But we do not determine that these differences between the two affect the construction to be given to them. As to the term "party" being used in one and "parties" in the other, which is also the case in the 4th and 17th sections of the statute of frauds, it has been often held that the difference in these two made no distinction in the construction to be given to both: Browne on Frauds, section 365, and cases cited; Broom's Commentary on the Common Law, 421. Nor do we pronounce whether the construction of the section in the Code is different from what it otherwise would be, on account of the change of the words "note or memorandum" to the word "promise." In the case before us there was neither note, memorandum, or

promise in writing, signed by the party sought to be charged. As to the "sale tickets" made out by the sellers and signed by them, although it might have been sufficient to bind the plaintiff, it was not binding on the buyers. Benjamin, in his work on Sales, page 174, says: "Under both sections (of the statute of frauds) it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed." In support of this he cites, *Allen vs. Bennett*, 3 Taunt, 169; *Thornton vs. Kempster*, 5 Taunt, 786; *Laythoarp vs. Bryant*, 2 Bingham, (North Carolina,) 735. The same rule is stated in 1 Greenleaf's Evidence, section 268, which says: "Neither is it necessary * * * that both (parties) be *legally bound* to the performance (of the contract,) for the statute only requires it to be signed by the party to be charged therewith, that is by the defendant against whom the performance or damages are demanded." See, also, *Clason vs. Bailey*, 14 John, 434, where the question is fully discussed, and many authorities cited, recognizing that where one party signs the contract it may be good to charge him with the performance of it, when he could not enforce it against the other: *Browne on Frauds*, section 366; *Western vs. Russell*, 3 Vesey & Beame, 192; *Hawkins vs. Holmes*, 1 Peirre Williams, 770. Many other cases might be cited where an action has been maintained on a contract signed only by one of the parties. But I have not found one, unless it was brought against the party who did sign. In the case of *Clason vs. Bailey*, *supra*, the Chancellor, in pronouncing the opinion, said: "It appears to be settled that though the plaintiff has signed the agreement he never can enforce it against the party who has not signed it. The remedy in such case is not mutual. But notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned." *Linton & Company vs. Williams*, 25 Georgia, 391; *Douglass vs. Stears*, 2 Nott & McCord, 207, were cases against the parties who signed, and so is every case which I have been able to find.

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In sustaining the actions in such cases, expressions have frequently been used, implying that there was a mutual obligation resting on the parties which each could enforce against the other, although but one may have signed the contract. But, as stated, I have seen no case where judgment has been given affirming a recovery had in an action brought by the one who signed, on the ground that both parties were bound because the plaintiff himself had made a memorandum and affixed his own signature.

3. Where cotton factors sell cotton consigned to them, they may, in their own names, recover the damages resulting from a breach of contract by the buyer, although they may be bound to pay the same, when recovered, to their consignors. They have a special property in the cotton. They have a lien on it for their commissions, which commissions attach on the very damages they may recover, and would be increased thereby. We did not understand this to be controverted.

4. The measure of damages in such cases is the difference between the contract price for the cotton and the value thereof on the day of the breach: Benjamin on Sales, 559, and the authorities there cited. In *Barrow vs. Arnaud*, 8 Queen's Bench, 604, the rule is stated to be "the difference between the contract and the market price of such goods at the time the contract is broken;" and the reason assigned for such a measure of damages is, "that the seller may take his goods into the market and obtain the current price for them."

5. The Court, in the charge to the jury, limited the plaintiff's right of recovery "to the amount of damages actually sustained by themselves." This may have misled the jury, and probably did. As heretofore stated, although the plaintiffs might be bound to pay over to the owners of the cotton whatever they recovered in the suit, less their commissions on the same, they yet were entitled to maintain the action for the whole amount of damages occurring from the breach of the contract. Their commissions would be but a small per centage of this—say two and a half per cent. That two and a half per cent., or the amount of the commissions, was the

real and actual damage to plaintiffs. Counsel for plaintiffs claim that these commissions were just what the verdict was for. We cannot say as to this; but as the jury did find for the plaintiffs on the main question, to-wit: that there was a breach of contract by the defendants, and as they were probably misled by this charge of the Court, we think there should be a new trial. It might be added that the charge, in so far as it was stated that the "sale tickets" of the 14th of April, as it was not signed by the defendants, was not sufficient to take the case out of the statute of frauds, seemed to ignore the fact that part of the cotton sold that day had been delivered, and was accepted and actually received by the defendants. If so, they were bound by the contract for the purchase that day made.

Judgment reversed.

APPENDIX.

On Monday, December 15th, 1873, during the July term of the Court, at the instance of the Honorable Richard H. Clark, a committee was appointed to report at the next term a memorial commemorative of ISAAC E. BOWER, Esq., lately deceased.

At the next term, on Tuesday, February 24th, 1874, said committee submitted the following report :

“We, whose signatures are hereto attached, were appointed a committee to report at this term a tribute to the memory of the Honorable ISAAC E. BOWER, a member of this bar, who died at Bainbridge, Georgia, on the 7th October, 1873, in the sixty-third year of his age.

“His native place was Milledgeville, Georgia, and the date of his birth, 28th February, 1811. His father was Isaac Bower, and his grandfather John Bower, who was a sculptor, of Providence, Rhode Island, and there died, in the year 1803. In 1823 his father moved with his family to the Arkansas territory. ISAAC E. BOWER there remained until 1831, when he returned to Georgia. In 1833 he began the study of law. During this period he attended the lectures of Judge Gould, of Augusta, Georgia, and in 1835 was admitted to practice. He soon settled in Talbotton, Georgia, where he married Miss Adeline B. Breedlove, who survived him. From Talbotton he moved to Cuthbert, Georgia, where he resided for some ten years. From there to his plantation in Baker county, and in 1867 he settled in Bainbridge, to resume the general practice of his profession, which he had continued, within certain limits, while living a plantation life.

“In discharging the duty assigned, we do so with the consciousness that there is nothing we can say that will lessen the grief of hearts that mourn, or that can exalt, with those who know him, the beautiful character of our deceased brother.

Yet it is a duty the living owe the virtuous dead to place some memorial in their honor on record. When men have been in continuous social intercourse, and death enters the circle, bearing off a victim, the survivors should be as ardent to cherish his memory as to respect or love him while living. There is no profession or other pursuit in life where each one is so much the equal, friend and brother of the other as in that of law. The bar is a social as well as a legal organization. The death of one comes home to all, and is felt in a variety of ways. On each assembling after each sad event we number one less. There is a chair vacant, a presence gone, and a voice silenced forever. It sometimes is a voice musical in tone and eloquent in expression, that for many years has charmed all who heard. The vacuum thus created is palpable, and is painfully felt. There shall be no more encounter of logic or humor in friendly strife; and as this is over forever, for it we love the departed the more. The contention for a principle, that the right may prevail, sanctifies the conflict and endears legal adversaries.

“The true lawyer has a profound love for justice and liberty, and he makes his professional life square with his private life. He is loyal to truth, the friend to the weak and the enemy of oppression in all its forms. The conscious rectitude of defending the poor and helpless against wrong, affords a compensation which the gold of the rich cannot supply. Such a lawyer, in the words of a famous modern author, ‘belongs to the great souls who love justice, and who love law, as *the means* by which justice is done.’

“To this noble class of lawyers belonged our deceased brother. The same virtues he practiced in his intercourse with society governed his professional conduct. He did not have one character out of the Court-house, and another in it. With him what was dishonorable in the man was dishonorable in the lawyer. His moral sense was as keen as his intellect was comprehensive. These, in harmonious blending, placed him in the front rank of our profession. His mind was logical, closely discriminating, and capable of a subtle analysis. He was always fervently in earnest, and aspired more to the faith-

ful and successful discharge of duty than to win applause, either from bench, bar, or audience. He had a quiet, gentle manner, and a dignified yet social reserve in all his associations. Sensitive about his own, he was always considerate of the rights and feelings of others. He never indulged in wordy declamation, and his arguments were confined to the point without superfluity. If his cause was strong his fertility of mind made it stronger; if weak, the same resource gave it the *appearance* of strength. He was always calm and self-poised. His forensic efforts were easy and natural, with a freedom from all strain of mind or labor of utterance. Whatever his side, he was a dangerous adversary, and however intellectual his antagonist, he would have need for all his power. He was skilled in 'the cut and thrusts,' of polemics, and if there was a weak place in his adversary's armor he would find and pierce it. His pure private and professional character gave him influence with juries, and his clear arguments, supported by an unusual familiarity with authority, made him formidable before the Courts. He was simple in his tastes, temperate in his habits, and amiable in disposition. Contests at the bar, or elsewhere, were repugnant to his nature. He loved peace and retirement, but when duty called he entered the conflict bravely and bore himself gallantly.

"It was in the seclusion of home and in the pursuit of agriculture he found the most enjoyment. As already disclosed for many years he resided upon his farm. It was far from city or village and in the midst of a deep forest, in the county of Baker. It was just such a spot as a man might be expected to select who had passed so much of his boyhood's life in the wilds of our frontier. From his cot 'below the pine,' he could go forth 'to till the soil,' or 'tend the flock.' It was on the banks of a stream singularly beautiful, none perhaps more so, and such an one if Burns had seen would have inspired him as much as the Ayr or the Doon. From this beautiful rural spot, so the opposite of a lawyer's life of labor and strife, the transition to the town of Bainbridge to again embrace it, was, *to him*, easy and natural. As when he was farmer you would never suspect he had been lawyer, so

when lawyer that he had been farmer, and with such quiet and placidity did he lay down the one and take up the other, or practice them together.

"The same even temperament and love of quiet caused him to decline all political offices or the ways of seeking them, but he was twice called from his retirement by his fellow-citizens to represent them in the State Convention of 1865, and as Senator in the Legislature of 1865 and 1866. His mind being judicial in its nature and culture, his disposition amiable and impartial, he was fitted by nature and education for the bench, and had he been more demonstrative and self-asserting would have been thus promoted before he had reached the meridian of his long legal career of nearly forty years. During the war he was past the age for general and active service in the field, but did serve as captain of a company of State troops. He was emphatically a man of duty; that word was the shibboleth of his life, and having satisfied his conscience he was indifferent to censure and not changed by praise.

"His heart was with his 'native land' in the recent fearful struggle, and he shared largely in our common calamity. Its close found him well over on the sunset side of life. Like many such, life to him had lost its charm and become burdensome. He was daily looking and ready for the summons, which would remove his load, and bring in its stead the rest and peace of the grave. For this he patiently waited with christian faith and resignation. Expressive of this feeling, there was found among his papers some verses, dated and written on the national holiday of the 4th of July preceding his death in October. The first reads:

'Oh, I am waiting—ah, why should I stay,
In a world so lonely, so cheerless and dreary;
My early companions have all flown away,
And left me—so weary—so weary.'

"And the sixth:

'But, tho' lonely, my God, I am content to stay,
And bide thy good will, tho' lonely and dreary,
Till thy voice shall call my spirit away,
Where the trusting soul is never more weary.'

"His 'dreary and weary' body had not long to 'wait.' When the pestilence last fall entered the little city of Bainbridge, in grim mercy, it claimed him for its first of many victims.

"The domestic life of such a man must have been, as it was, blessed with the love and happiness of wife and children. He died, as he must have desired, in the retention to the last of speech and intellect, with all his family around him, of whom he took an affectionate and final farewell, and then quietly sank to his everlasting rest.

"In conclusion, we recommend the adoption of the above by the Court and bar, as an expression of the love and respect they bore our deceased brother, and the high estimate they placed upon his professional career; that it be entered upon the minutes, and a certified copy thereof be presented to his family.

(Signed)

"RICHARD H. CLARK,
"RICHARD F. LYON,
"JOHN C. RUTHERFORD,
"WILLIAM E. SMITH,
"C. B. WOOTEN,
Committee."

The Court ordered as requested.

INDEX.

ABATEMENT.

When on the trial of an affidavit of illegality to an execution, the Judge held the judgment to be dormant for want of an entry within seven years, and the next day the plaintiff sued out a *scire facias* to revive, and subsequently to this suing out of a *scire facias* he filed a bill of exceptions to the judgment of the Judge, but afterwards withdrew it:

Held, that the pendency of the bill of exceptions could not be pleaded in abatement to the *scire facias*. *Bridges et al., vs. Thomas, adm'r*..... 378

ACKNOWLEDGMENT OF SERVICE.

See *Service*, 1, 6, 13, 14, 15.

ACTIONS.

If payment beyond the rate specified in the charter be made voluntarily by the shipper, through mere ignorance of the law, or paid "where the facts are all known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party," an action will not lie to recover it back. *Arnold & DuBose vs. Geo. R. R. and B'g Co*..... 304

ADMINISTRATORS AND EXECUTORS.

1. When a portion of the assets of an estate consists of an interest in a partnership of which the deceased was a member, it is the duty of an executor who knows the fact, to take notice of the claim in his inventory and return it to the Ordinary, but a failure to do this, though an act justifying suspicion, does not require the executor to be charged with the nominal value of such interest, and he may show what was its real value. *Moses et al., vs. Moses, ex'r*..... 9
2. When, within a reasonable time after qualification, the executor has a settlement with a surviving partner of

the deceased, and receives from him, as the deceased's interest, part of the assets of the partnership in kind, such settlement is to be considered *prima facie* as a fair one, and if there be no affirmative evidence to the contrary, a jury is authorized to act upon it as a just and proper settlement. *Ibid.*

3. When an executor buys from a surviving partner of the deceased an interest in the partnership, giving his own note, and subsequently takes from the surviving partner that note as part of the deceased's share in the partnership, and substitutes in his hands, as executor, for that note other good and well secured notes belonging to himself as an investment of the money for the estate, such acts are not illegal, though they justify and require a close scrutiny into the good faith and *bona fides* of the transaction. *Ibid.*
4. When the assets of an estate came into the hands of an executor in October, 1860, and were mostly in promissory notes, and the legatees were most of them citizens of New York, and the executor made no returns to the Ordinary during the war, but managed their own affairs in this State, keeping books and making entries therein of his transactions, and in 1865 made a full return of his acts to the Ordinary, and procured from him a special order excusing his failure to make returns during the war and allowing him his commissions:
Held, that a verdict of a jury is not illegal which recognizes the executor as not in default for failing to make returns during the war, and which excuses him for losses upon investments made in good faith, and under such circumstances as other prudent men acted. *Ibid.*
5. Until the adoption of the Code, 1st of January, 1873, there was no particular fund or bonds in which trustees were required by law to invest, and investments made as other prudent men invested their funds, if made in good faith, will protect an executor if he be guilty of no illegality. *Ibid.*
6. It is not improper for a jury to allow an executor reasonable counsel fees for advice and aid in the management of an estate and making returns. But when the legatees file a bill against the executor for an account charging a *devastavit*, it is improper and illegal

to allow the executor counsel fees for defending the bill unless it plainly appear that there are such complications and conflicting claims among those interested in the estate as to make it necessary for the interest of the parties, that the settlement should be by a decree of the Court. *Ibid.*

7. A wife's share of her deceased father's real estate, not distributed, but remaining undisposed of between the heirs, the same being wild lands, is not so in possession of the husband as to bar the wife's right of survivorship, if he dies before it is distributed or divided. *Hooper vs. Howell, guardian*..... 165
8. An administrator's sale is not void if he have proper and legal authority to sell. If he fail to comply with the law as to the mode of sale, the sale is voidable except as to innocent purchasers. *Patterson vs. Lemon*. 231
9. Under sections 2518, 2519 and 2520, of Irwin's Revised Code, the place of sale of lands by an administrator may be either in the county having jurisdiction of the administration, or in the county where the land lies, according to the discretion of the Ordinary in each case; and if land be sold in either county without such special direction, the sale is not void, but voidable only accordingly as the present owner of the land is or is not an innocent purchaser. *Ibid.*
10. Where land lying in the county of Fulton was sold at administrator's sale, in said county, in the usual mode, and the deed to the purchaser recited the judgment of the Ordinary of Cobb county authorizing a sale and that the sale was after due advertisement had, at public auction, on the first Tuesday of the month, between the usual hours, at the Court-house door of Fulton county, and the purchaser at the sale afterwards sold to another, who had no notice of any irregularity in the mode of sale:
Held, that if the order to sell in fact existed, the sale could not be avoided by the heirs-at-law as against such second purchaser, on the ground that the Ordinary had passed no special order directing the sale to be had in Fulton county, unless he had notice of the want of such special order. *Ibid.*
11. An administrator with temporary letters granted by the Ordinary, may institute suit for the purpose of col-

- lecting the effects of the deceased, and if permanent letters are granted pending the action, the general administrator thus appointed may be made a party to the action. *Ewing et ux., adm'r, and adm'x, vs. Moses, adm'r*..... 264
12. Whatever may be the remedies that have been provided by statute against administrators and their securities, the concurrent jurisdiction of equity over the settlement of accounts of administrators is specially retained by section 2600 of the new Code. *Ibid.*
13. An account was contracted and due in September, 1862. Administration was granted on the estate of the debtor in September, 1869, it not appearing in the record when he died. Suit was instituted on the account in October, 1871 :
Held, that the action was barred by the statute of limitations of March 16th, 1869. Even though the plaintiff may not have been entitled to have brought suit against the administrator by the first of January, 1870, which we do not determine, the spirit and equity of the statute require that it should have been commenced within a period after twelve months from the grant of administration, which was equal to the time allowed by the statute for bringing suits on such debts, to-wit : from the date of the passage of the Act to the first of January, 1870. *The Moravian Seminary, etc., vs. Atwood et al., adm'rs*..... 382
14. The testator, by his will, authorized his executors to sell his property upon such terms as to notice or credit as they might, in their sound discretion, deem best :
Held, that the executors had the power to sell the property without an order from the Ordinary, either for cash or credit, and upon such notice as they, in their sound discretion, might deem best ; but in all other respects they were bound to comply with the law regulating such sales. *Jackson et al., ex'rs, vs. Williams et al* 553

ADMISSIONS. See *Evidence*, 10.

ALIMONY. See *Divorce*.

AMBIGUITY. See *Evidence*, 4.

AMENDMENT.

1. After a bill seeking discovery has been answered, the complainant cannot amend his bill so as to waive discovery, and thus get clear of the defendant's answer. *Allen, adm'r, vs. Woodson, ex'r, et al.*..... 53
2. When a bill was filed against the administrator of a deceased partner seeking an account of certain partnership funds which it was alleged had been collected by the partner and misapplied, and pending the suit and after the 1st of January, 1870, the bill was amended so as to charge, in addition, that said deceased partner had also received to his own use the rents of certain real estate belonging to the partnership, and that he had not accounted therefor :
Held, that the amendment did not introduce a new cause of action, but only added an item to the original cause, and if the plea of the statute of limitations was not good to the original suit, it was not good to the amendment. *Ibid.*
3. Where there is a levy upon land entered by the sheriff upon an execution, but by mistake the entry is not signed by the sheriff, the failure to sign is not fatal to the levy. The sheriff may amend it by adding his signature. *Sharp vs. Kennedy*..... 208
4. Where a declaration was filed and process attached against a corporation, and a regular return made by the sheriff that the defendant was not to be found, and that the president of the corporation was dead, the plaintiff is not entitled, after the lapse of five terms of the Court, without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term, and to perfect service by publication under section 3370 of the new Code. *Branch vs. Mechanics' Bank*..... 413
5. Where a creditor's bill was filed against a railroad company and a decree had, adjudicating the dignity and priority of the various claims before the Court, and directing the sale of the road, a creditor, who was a party to such decree, cannot subsequently, but before the distribution of the proceeds of such sale, by an amendment to the original bill, set up a preferred claim held by him as collateral security for the in-

- debtedness passed upon by such decree. *Clews & Co. vs. Brunswick & Albany R. R. Co. et al.*..... 522
6. The creditor's debt was contracted in 1859 and the bill was filed in 1869, originally against the administrator, the purchaser and his vendor, and the widow of the intestate who had taken dower, charging notice of the lien on each, and praying a sale of the land for the discharge of the vendor's lien. By amendments made after January 1st, 1870, all parties defendants were stricken from the bill, except the administrator and the first purchaser, who, it was charged, had not paid for the land. The prayer was also amended, asking judgment on the debt against the administrator, and that the purchaser be decreed to pay his debt due the estate to complainant, and praying an injunction restraining the collection of the debt due by the purchaser :
- Held*, that no necessity was shown why the purchaser should be a party, or for the relief prayed against him, or for any injunction, and the bill should have been dismissed as to the purchaser. *Atkinson vs. Keith, adm'r, et al.*..... 577
7. The amendment to the prayer was a proper amendment and the bill was not, on account thereof, demurrable, on the ground that the relief then prayed was barred by the Act of March, 1869. *Ibid.*

APPEALS.

- The Constitution of 1868 intended to provide for an appeal to the Superior Court from the judgments of Justices of the Peace, in all cases where the amount in controversy between the parties was over \$50 00, whether that controversy originated in a claim case or in any other class of cases of which the Justices of the Peace had jurisdiction to hear and determine. *Burts vs. Farrar*..... 601

ARBITRAMENT AND AWARD.

1. An exception to an award relating to the testimony will not be considered in this Court, where the evidence is not in the record, and does not appear to have been exhibited to the Court below. *Phipps vs. Tompkins et al.*..... 641

2. Where pending litigation, by consent, was, by an order of Court, referred to the decision of three arbitrators, two of them being named, they to select a third, and the questions at issue were heard before the two arbitrators named, who made an award, it is incumbent on the party excepting to the award on the ground that the matters in dispute were not heard before three arbitrators, to negative all presumptions in favor of the award by alleging either that he was not present when the award was made, and was not heard before the two arbitrators, or that he objected at the time to proceeding before them. *Ibid.*

ASSIGNMENT. See *Debtor and Creditor*, 4.

ATTACHMENT.

1. When a defendant in an attachment is adjudged a bankrupt within four months after the issuing of the attachment, and the assignee comes in the Court where the attachment is pending and makes it known that the defendant has been so adjudged a bankrupt, and moves to have the attachment declared dissolved:
Held, that the Court ought to grant the motion, and that it was not necessary for the assignee to make himself a formal party to the attachment before moving to have it declared dissolved. *Louden, assignee, vs. King*..... 302
2. An attachment was, by mistake, levied on the wrong lot of land. Judgment was entered in pursuance with the levy. The plaintiff filed a bill to correct the mistake. This proceeding was dismissed at the trial term on demurrer:
Held, that such dismissal was error. A Court of equity having obtained jurisdiction, should have proceeded to have heard the case, and have rendered such decree as the ends of justice might have required. *Wardlaw, adm'r, vs. Wardlaw*..... 544
3. Where lot two hundred and eighty-seven is intended to be levied on by an attachment, but the entry of the sheriff describes lot two hundred and sixty-eight by mistake, there has been, in fact, no levy made on the right lot. *Ibid.*

ATTORNEY.

1. It is not improper for a jury to allow an executor reasonable counsel fees for advice and aid in the management of an estate and making returns. But when the legatees file a bill against the executor for an account, charging a *devastavit*, it is improper and illegal to allow the executor counsel fees for defending the bill, unless it plainly appear that there are such complications and conflicting claims among those interested in the estate as to make it necessary for the interest of the parties, that the settlement should be by a decree of the Court. *Moses et al. vs. Moses, ex'r*..... 9
2. Where a balance of money collected on an execution remained in the sheriff's hands, which he was notified was claimed by the attorney for the plaintiff in *fi. fa.* as his fee, and after such notice judgment was rendered against him on a process of garnishment sued out at the instance of a creditor of said plaintiff, he making no defense, which judgment he satisfied, it was not error in the Court, on the hearing of a rule *nisi* requiring him to show cause why he should not pay over such balance to the plaintiff's attorney, to make the rule absolute. *Gray, sheriff, vs. Maxwell, trustee*... 108
3. In a declaration claiming damages for words calculated to injure the plaintiff's reputation as an attorney at law, it is not sufficient to allege that the defendant was an attorney, it must be stated and proven that the words were used "in reference to his profession." *VanEpps vs. Jones*..... 238
4. When an administrator was sued in ejectment, and contracted with an attorney to defend the suit, and agreed to give him one-half the land if the defense was successful, and the attorney so employed procured another attorney to represent him at the trial, and the defense proving successful, the administrator sold the land under an order of the Ordinary, had it bid off for himself and the substituted attorney, and then divided the land between himself and the substituted attorney, and the attorney first employed filed a bill against the administrator and the substituted attorney for a specific performance of the original agreement:
Held, that it was not error for the Chancellor to charge the jury that a bill for specific performance would lie

- in such a case against the administrator and the substituted attorney. *Stansell vs. Lindsay et al.*..... 360
5. A mortgage is not illegally foreclosed because the affidavit of the mortgagee for foreclosure is made before a Notary Public who is also an employee in the office of the attorney at law, employed by the mortgagee to foreclose the same. *Goodrich et al. vs. Williams*..... 425
6. Where an instrument is produced, signed by the plaintiff in error, stating that the case was carried to this Court without authority from him, and consenting to its dismissal, his counsel will not be permitted to proceed with said litigation for the recovery of their fees, except upon showing that the case had been settled by the defendants in error with notice of the contract under which they were to be compensated. *Green vs. Stringfellow et al.*..... 486
7. Knowledge that the movants were of counsel, and that their client was insolvent, is not such notice. *Ibid.*
8. Under the facts in the record, the decision of the Judge to whom the whole matter was submitted, refusing the compensation asked for, was not contrary to law, and there was no error in overruling the motion for a new trial. *Hines & Hobbs vs. The Brunswick and Albany R. R. Co. et al.*..... 563
9. Where an attorney recovers different parcels of land for his client, under a written agreement that the attorney should have a particular lot so recovered for his services, and there is no evidence of fraud, or that the services were not worth what was contracted for, the attorney, under section 1979, Revised Code, can claim such lot against the lien of a judgment existing against his client at the time the agreement was made, the more especially if the creditor never sought to enforce his judgment against the land until subsequent to its recovery, after a protracted litigation on the part of defendant and his attorney. *Walton vs. Little* 599

AUDITOR.

Where the Court, at a regular term, appoints an auditor, in a case involving matters of account, with the powers as provided in section 4202 of the Code, and no exceptions thereon are certified, filed, etc., during the term as by law prescribed, it is too late when the aud-

itor proceeds to act in vacation, to object to his appointment, or to the powers conferred on him, or to make such objections the ground of exception to his report. *Tutt vs. Land*..... 339

BANKRUPT.

1. A purchaser of property at an assignee's sale in bankruptcy, under an order of the Register to sell subject to incumbrances generally, is not estopped from denying that a particular incumbrance is a good and valid incumbrance, and he may show that a mortgage on the property purchased, was made by the bankrupt in fraud of his creditors, and is therefore void. *Murray & Co. et al. vs. Jones et al.*..... 109
2. A *bona fide* purchaser without notice of a promissory note and mortgage to secure it, who buys before the debt becomes due, is protected against a defense, that the mortgage was made by the debtor in anticipation of bankruptcy and to defraud his creditors. *Ibid.*
3. When a defendant in an attachment is adjudged a bankrupt within four months after the issuing of the attachment, and the assignee comes in the Court where the attachment is pending and makes it known that the defendant has been so adjudged a bankrupt, and moves to have the attachment declared dissolved :
Held, that the Court ought to grant the motion, and that it was not necessary for the assignee to make himself a formal party to the attachment before moving to have it declared dissolved. *Louden, assignee, vs. King.* 302

BILL OF EXCEPTIONS.

See *Practice in Supreme Court.*

BONDS.

1. Bonds owned by citizens and residents of the city of Augusta on corporations, or individuals resident out of the city, are property within the city, so as to be subject to taxation by the city authorities, under their general power to assess a tax upon property within the limits of the city. *City Council of Augusta vs. Dunbar* ... 387
2. Under the laws of this State, a municipal corporation cannot levy a tax on the bonds issued by the State,

even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State itself ought not to be presumed to have done in the absence of clear language so declaring. *Ibid.*

3. In 1857 the Legislature passed an Act making the county of Floyd a corporation, and declared that it should be represented in its corporate capacity by the Inferior Court of said county. The Act further provided that on the first Monday in February, 1858, or at any time thereafter which shall be determined, ordered and published by the Inferior Court, the people of the county should vote on the question of subscription or no subscription, and that the returns of the election should be made to the Justices of the Inferior Court, who shall consolidate the same and enter the result upon the minutes of the Court. The Act further provided that if a majority of the votes should be for subscription, the Inferior Court should subscribe to not less than fifty nor more than one hundred thousand dollars of stock in the Georgia and Alabama Railroad, and issue bonds of the county of Floyd therefor to said company, payable not exceeding ten years from date, bearing seven per cent. interest, payable semi-annually at such place as the said Inferior Court may determine. In October, 1859, the Inferior Court passed an order reciting that it deemed it for the interest of the county that said road should be built, and ordering the election as provided. Due notice was given, the election had, the returns made, consolidated, and the result entered on the minutes. Thereupon, without any further entry on the minutes, a majority of the Justices agreed among themselves to subscribe, proceeded to the company's office and did subscribe for \$75,000 00 of stock, and issued bonds as called for to the amount of \$25,000 00. Each Justice signed the subscription in the absence of the others, and also signed his name to the bonds in the absence of the others. The bonds were made payable to Alfred Shorter, President of the Georgia and Alabama Railroad Company, or order, and having been by him indorsed, were in the hands of the plaintiff as holder:

Held, that when the election was duly had, and the result entered on the minutes, the authority of the Inferior Court to make the subscription and issue the bonds was complete, without any further entry or order of the Court that it would make the subscription. *Commissioners of Roads, etc., vs. Shorter*..... 489

4. By the words "Inferior Court" in the Act, the Legislature meant the "Justices of the Inferior Court," or "the Inferior Court for county purposes," and not the Inferior Court proper sitting twice a year as a Court of law under the existing Constitution of the State. *Ibid.*
5. However proper for public information and for the regularity of business it would have been that the minutes of the Inferior Court should show that the subscription was made and the bonds issued, with full details of the whole transaction, yet, when the result of the election was put upon the minutes, as the Act required, the authority of the Court to make the subscription and issue the bonds was complete, and under the uniform practice of the "Justices of the Inferior Court" in this State, in making contracts within the scope of their authority, it was competent for the Justices to make said subscription and sign and issue said bonds when they were not regularly in session as a Court. *Ibid.*
6. It appearing that a majority of the Justices did in fact sign said subscription officially, and sign and issue the said bonds as "Justices of the Inferior Court" of Floyd county, the bonds are binding upon the county, especially in the hands of third persons *bona fide* holders thereof. *Ibid.*
7. The indorsement on the bonds by "Alfred Shorter, President Georgia and Alabama Railroad Company," passed the title in the bonds to the holder. The bonds being issued for purposes of negotiation, this was a sufficient indorsement to put them in circulation, notwithstanding the charter of the railroad company required a different mode of making and signing ordinary contracts to bind the company. *Ibid.*

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CERTIORARI.

The petition for a *certiorari* is an *ex parte* proceeding, and if the petition shows a proper case for the writ, it ought to be granted. It is error in the Judge to hear contradictory or supplementary statements from defendant. *Ruff et al. vs. Phillips et al.*..... 130

CHARGE OF COURT.

1. It is not error in the Court to call the attention of the jury to the importance of the case and the trouble it has given, and to suggest the desirableness of disposing of it by a final verdict. *Allen, adm'r, vs. Woodson, ex'r, et al.*..... 53
2. On the trial of an action brought upon a promissory note, the Court charged the jury that the note, upon its face, was a promise unconditional to pay the principal and interest appearing to be due thereon, and that parol evidence to show that the interest was not to be paid at all events, but was to depend on the profits of an uncertain partnership speculation, should be of a satisfactory character, or strong enough to overturn, in the minds of the jury, the *prima facie* evidence of the original contract as furnished by the writing :
Held, that this was not an expression of opinion by the Court as to facts which had been proven, so as to be error, under section 3183 of Irwin's Revised Code. *Johnson vs. Sims.*..... 119
3. The Court erred in charging the jury that if the first and second contracts had been abandoned, the jury must find according to the testimony of L. Moore. *Moore vs. Stone.*..... 157

4. When the Judge on a trial charged the jury that if a creditor agree to receive from his debtor a less sum in satisfaction of a greater, and the less sum is paid him, and he accepts it, the contract is executed, and he cannot treat it as a nullity and sue for the balance, and the only evidence of a settlement was the testimony of a witness who swore that the debtor had left with him some money and papers to be given to the creditor, and that he had given them to him :

Held, that there was no evidence to justify the charge.

Graham et al. vs. Howell et al., ex'rs...... 203

5. Where a declaration charged that the defendant had, with force and arms and violence, broken the plaintiff's close, and with his feet and one hundred head of cattle, trampled upon and damaged his crop, and the proof showed that defendant was the plaintiff's landlord, that he had undertaken to repair the fence around the close, and in so doing had negligently taken down the fence and exposed the crop to the ingress of cattle; and there was some evidence going to show that plaintiff had consented to the defendant's going upon the land and making the repairs :

Held, that there being no count in the declaration for damages from the negligence of the defendant, but only for the trespass with force and arms, that it was error in Court to charge the jury that if the defendant tore down the plaintiff's fence, and cattle got in and destroyed the crop, the defendant was liable for the damages. *Roach vs. Trotter*..... 251

6. The effect of the charge was to exclude from the jury the evidence of the plaintiff's consent to the repair of the fence. If such consent was in fact given, then the defendant was only liable for negligence in repairing the fence, whereas the charge of the Court makes him liable if he tore down the fence and damage resulted. *Ibid.*

CLAIM.

1. Where a bill of exceptions is filed to proceedings had upon the trial of a claim case, the defendants in *fi. fa.* are not necessary parties. *Graves vs. Tifts*..... 122
2. Where there is no evidence that the defendant was in possession of the property before or after the judgment was rendered against him, and no title was shown in

- him, the fact that he conveyed the same by deed subsequent to said judgment, and possession was taken thereunder by the vendee, does not render the property liable thereto. *Wimberly, trustee, vs. Collier*.... 144
3. Where land is levied on as the property of A, and is claimed by B under our claim laws, the pendency of the claim does not make it illegal for other judgment creditors of A to levy on and sell the land at sheriff's sale. *Walker et al. vs. Zorn*..... 370

CLERK OF SUPERIOR COURT.

- Whilst it is the duty of the clerk of the Superior Court to keep a proper index of his books of record, so that one searching the records may easily find what is or is not contained therein, yet a deed or mortgage which is in fact recorded, does not cease to be notice and to be properly recorded, simply because the index to the record book fails to show where it may be found. *Chatham vs. Bradford, sheriff*..... 327

COLLATERAL SECURITY.

See *Promissory Notes*, 1.

COMMON CARRIERS.

1. When a carrier sets up the defense that the loss of property delivered to him for transportation was occasioned by the public enemies of the State, he must establish that fact by clear and satisfactory evidence. *Wallace, sup't, vs. Sanders*..... 134
2. When property received for shipment by a carrier and placed upon one of his cars, was removed therefrom by the public enemies of the State, it was incumbent upon the carrier to care for the property after it was taken from the car, and if he failed to do so in such reasonable manner as was necessary and practicable under all the circumstances, and it was lost, he will be held liable. *Ibid.*
3. When a common carrier by steamboat, undertook to carry cotton under a special contract, in which it was stipulated that he was not to be liable for unavoidable accidents, and one of the bags of cotton was lost by falling into the river, in consequence of the breaking of "the hog chain," or rod, against which the cotton

was piled on the deck of the boat; and on a suit brought for the loss, the defendant proved that the rod had been lately examined, and that it appeared sound; that it had previously borne heavier weights, and that it broke in consequence of a hidden flaw:

Held, that it was not error in the Court to charge the jury, that if the cotton was lost under these circumstances, the defendant was liable. *Central Line of Boats vs. Lowe*..... 509

See *Railroads*.

CONFEDERATE STATES. See *War*.

CONSTITUTIONAL LAW.

1. Where an Act was passed by the Legislature in the year 1872, "for the removal of the county site of Lee county, to compensate the owners of real estate at Starksville, and for other purposes," the body of which was in accordance with its title, and in 1873 a second Act was passed, the title to which was as follows: "An Act to amend an Act to authorize the Ordinary of Butts county to issue bonds to raise money to build a Court-house, and to authorize the commissioners to remove the county site of Lee county, to issue bonds of said county to build a Court-house and jail at the new county site of said county of Lee, and for other purposes:"

Held, that the two Acts in relation to the county of Lee should be construed together as one Act; and thus construed, the removal of the county site of Lee county, and the provision for the payment of the cost of such removal incident to the erection of the public buildings at the new site, cannot be said to be more than one subject matter, as contemplated by the Constitution. *Allen et al. vs. Tison et al.*..... 374

2. In accordance with the opinion of a majority of this Court, in the cases known as the "tax cases," at the last term of this Court, the judgment of the Court below is reversed, on the ground that the Act of October 13th, 1870, is in violation of Article I., section 10, paragraph 1, of the Constitution of the United States. *Dougherty vs. Fogle. Dougherty vs. Chipley. Dougherty vs. Smith*..... 464

3. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property so as to be subject to the *ad valorem* and uniformity rules of taxation prescribed by the Constitution, and therefore a tax on fire insurance companies, different from what is imposed on life insurance companies, does not make the tax obnoxious to any constitutional requirement. *Home Insurance Company, etc., vs. City Council of Augusta....* 530
4. The Constitution of 1868 intended to provide for an appeal to the Superior Court from the judgments of Justices of the Peace, in all cases where the amount in controversy between the parties was over \$50, whether that controversy originated in a claim case, or in any other class of cases of which the Justices of the Peace had jurisdiction to hear and determine. *Burts vs. Farrar.....* 601
5. The owner of land taken for the use of the public, is entitled to be paid therefor the value thereof in money; but if, in appropriating his land for the use of the public, consequential damages result to the owner, the benefits which he may have derived from the appropriation, if any, may be set off against such consequential damages, but not against the value of the land. *City Council of Augusta vs. Marks.....* 612

CONTRACTS.

1. When a promissory note is made in South Carolina, payable on its face at Charleston, to a citizen of South Carolina, it is a South Carolina contract, notwithstanding the maker lives in Georgia, and notwithstanding, at the time of the making of the note, the maker also executes a mortgage to secure it on goods situated in Georgia, the residence of the mortgagor. *Goodrich et al. vs. Williams.....* 425
2. Assuming that the Confederate government could, for the purpose of carrying on war against the United States, divest the plaintiff of his property by seizure—which is not made a question here—and assuming that the Court was in error as to the necessity of an Act of Congress to authorize an impressment, and that it was absolutely necessary that full compensation should be made, so as to protect the title in an innocent holder, yet, under the facts of this case, as they stand without

question on the record, the plaintiff was entitled to a verdict. The defendant was fully informed of the instructions of the agents, that the iron was to be shipped to Atlanta to be rolled into plating for ships, and before the iron was in fact taken out of the possession of the plaintiff, contracted with the agent that when taken, the iron, instead of going forward to Atlanta, should be turned over to it. This contract was illegal outside of the instructions of the agent, and this was in the knowledge of the defendant, so that the actual seizure was in fact for the use of the defendant, and not for the Confederate States. The defendant is not an innocent holder, but is in complicity with the agent in his possession of the iron, and that under a contract entered into before the iron left the possession and custody of the plaintiff. In this view of the case the errors of the Judge, if they were errors, are immaterial, as the verdict must have been for the plaintiff. *Central Railroad and Banking Company vs. Atlantic and Gulf Railroad Company*..... 444

3. When an employee of a railroad company, by special written contract, at the time he was employed, and in consideration thereof, agreed "to take upon himself all risks connected with or incident to his position on the road, and that he would in no case hold the company liable for any damage he might sustain by accidents or collisions on the trains or road, or which may result from the negligence or carelessness, or misconduct of himself or other employee, or person connected with such road, or in the service of the company:"

Held, that such a contract, so far as it does not waive any criminal negligence of the company or its principal officers, is a legal contract. *Western and Atlantic Railroad Company vs. Bishop*..... 465

4. A verbal contract between two children, made during the life of the father, by which they sought to avoid the disinherison of one of them, which was threatened by the father should a marriage contemplated by said child take place, by which they agreed to divide the property between them, no matter what might be the parent's will, cannot be enforced in equity on a bill for specific performance. *Mercier vs. Mercier*..... 546

CORONER.

The coroner has no vested right to hold an inquest over the bodies of persons found dead in his county, and to charge the county therefor, when the public laws of the State do not require such action. *Fryer vs. Central Railroad & Banking Company*..... 581

CORPORATIONS.

The stockholders in the Gwinnett Manufacturing Company may be joined as defendants in an action by a creditor against the corporation. As they are liable for the debts of the company in proportion to the stock severally held by them, the pleadings should show the proportion. If the plaintiff has omitted to set out the amounts in the original pleadings, he can amend so as to insert them. Proceedings in this form would not affect the right of the stockholder, under the charter, to require any judgment thus obtained to be first enforced against the property of the company. *Andrews & Co. vs. Gwinnett Manufacturing Co. et al.*..... 637

COUNTY MATTERS.

1. The discretion vested in commissioners appointed for the purpose of changing the location of the county site, where they are authorized to act as they might deem best for the interest of the county, will not be interfered with unless abused. *Allen et al. vs. Tison et al.*..... 374
3. In 1857 the Legislature passed an Act making the county of Floyd a corporation, and declared that it should be represented in its corporate capacity by the Inferior Court of said county. The Act further provided that on the first Monday in February, 1858, or at any time thereafter which shall be determined, ordered and published by the Inferior Court, the people of the county should vote on the question of subscription or no subscription, and that the returns of the election should be made to the Justices of the Inferior Court, who shall consolidate the same and enter the result upon the minutes of the Court. The Act further provided that if a majority of the votes should be for subscription, the Inferior Court should subscribe to not less than fifty nor more than one hundred

thousand dollars of stock in the Georgia and Alabama Railroad, and issue bonds of the county of Floyd therefor to said company, payable not exceeding ten years from date, bearing seven per cent. interest, payable semi-annually at such place as the said Inferior Court may determine. In October, 1859, the Inferior Court passed an order reciting that it deemed it for the interest of the county that said road should be built, and ordering the election as provided. Due notice was given, the election had, the returns made, consolidated, and the result entered on the minutes. Thereupon, without any further entry on the minutes, a majority of the Justices agreed among themselves to subscribe, proceeded to the company's office and did subscribe for \$75,000 00 of stock, and issued bonds as called for to the amount of \$25,000 00. Each Justice signed the subscription in the absence of the others, and also signed his name to the bonds in the absence of the others. The bonds were made payable to Alfred Shorter, President of the Georgia and Alabama Railroad Company, or order, and having been by him indorsed, were in the hands of the plaintiff as holder:

Held, that when the election was duly had, and the result entered on the minutes, the authority of the Inferior Court to make the subscription and issue the bonds was complete, without any further entry or order of the Court that it would make the subscription. *Commissioners of Roads, etc., vs. Shorter*..... 489

3. By the words "Inferior Court" in the Act, the Legislature meant the "Justices of the Inferior Court," or "the Inferior Court for county purposes," and not the Inferior Court proper sitting twice a year as a Court of law under the existing Constitution of the State. *Ibid.*
4. However proper for public information and for the regularity of business it would have been that the minutes of the Inferior Courts should show that the subscription was made and the bonds issued, with full details of the whole transaction, yet, when the result of the election was put upon the minutes, as the Act required, the authority of the Court to make the subscription and issue the bonds was complete, and under the uniform practice of the "Justices of the Inferior Court" in this State, in making contracts within the

scope of their authority, it was competent for the Justices to make said subscription and sign and issue said bonds when they were not regularly in session as a Court. *Ibid.*

- 6 It appearing that a majority of the Justices did in fact sign said subscription officially, and sign and issue the said bonds as "Justices of the Inferior Court" of Floyd county, the bonds are binding upon the county, especially in the hands of third persons *bona fide* holders thereof. *Ibid.*

COURTS.

1. The County Court Act of January 19th, 1872, is a general law of the State, except as therein specially excepted; and the Act of August 24th, 1872, establishing a County Court in the counties of Dougherty and Lee, only repeals the Act of 19th January, 1872, so far as it is inconsistent therewith. *Graves vs. Tifts.* 122
2. Under the general law of January 19th, 1872, the Judge of the County Court has authority to issue distress warrants, and there is nothing in the Act organizing a County Court for Dougherty county, inconsistent with such an authority in the County Judge of that county, so that he also has authority to issue distress warrants. *Ibid.*
3. Where it appears from the minutes of the Superior Court of Chatham county that on the 7th of July said Court was in legal session, Judge Schley presiding; that said Judge adjourned the Court until ten o'clock next morning; that he had arranged with Judge Harris, of the Brunswick Circuit, then to hold the Court; that Judge Harris telegraphed on the 8th day of July, from Augusta, that he was providentially detained; that the clerk adjourned the Court from day to day until the 11th of July; that in the meantime, to-wit: on the 8th of July, Judge Schley ordered that if Judge Harris did not come by the 10th, the clerk should adjourn the Court until the 14th of July, which was accordingly done; that the Court convened on the 14th, Judge Schley presiding, and had been in session ever since:
Held, that the session was legal. *Cogswell vs. Schley, Judge.*..... 481

CRIMINAL LAW.

1. On the trial of an indictment for an assault with intent to commit rape, it appeared that the defendant, "early in the night, soon after dark," entered the house where there was but one room, and where the father, mother, and three sisters, aged respectively nineteen, seventeen and eleven years, were in bed, approached the bed in which the oldest and youngest sisters were lying, pulled down the cover, and put his hand on the lower portion of the person of the oldest sister; that she gave the alarm instantly, and the defendant immediately fled from the house. Counsel for defendant requested the Court to charge the jury that if the prisoner went there with the intent to desist as soon as he found out that the woman would not consent, he is not guilty of the charge, and the jury will so find:
Held, that the request was a proper one, under the facts in evidence, and should have been given by the Court in its charge to the jury. *Taylor vs. The State*..... 79
2. On the trial of a keeper of a billiard table, charged with permitting a minor to play billiards at his table without the consent of the parent or guardian of the minor, the burden of proving that the parent or guardian did not consent, is upon the State. *Conyers vs. The State*..... 103
3. Where upon a trial had upon an indictment for the offense of murder, the jury return a verdict finding "the prisoner guilty of manslaughter," the legal effect of the verdict was to find the defendant guilty of the highest grade of manslaughter, to-wit: voluntary manslaughter. *Welch vs. The State*..... 128
4. When there was a trial on an indictment for murder, and the prisoner was found guilty, and the evidence showed that the killing was without justification or sufficient excuse, and after a motion for a new trial was made and overruled, it was discovered that defendant could prove that deceased had, a few days before the killing, said he intended to kill prisoner, and had borrowed a pistol, expressing such intent, but it did not appear that at the time of the killing the prisoner was informed of such threats of the deceased:

Held, that it was not error in the Circuit Judge to refuse a new trial on the ground of this newly discovered evidence. *Peterson vs. The State*..... 142

5. Upon trials for the offense of bigamy, and for marrying another man's wife, proof of the previous marriage in fact is sufficient, without the production of the license from the Ordinary, or evidence that the person executing the same was an ordained minister of the gospel. *Murphy vs. The State. Chambers vs. The State*..... 150

6. When there was an indictment for compounding a felony, and it appeared that the defendant had suffered serious damages from an assault with intent to murder by one Boston; that he had sued out a warrant against Boston, who was arrested and recognized under said warrant; that one Morrow, as the friend of Boston, had applied to defendant to settle the case; that defendant had declined to settle, except for the damages, stating that if he settled the whole, he should have to absent himself from Court; that subsequently Mr. Doyal, who was defendant's attorney in the suit for damages, had, without any special authority from defendant, and in his absence, settled with Boston for the damages; that in this settlement it was distinctly stated and stipulated that there was no settlement of the prosecution, although, as was then by the written settlement stated, the defendant expressed himself as satisfied, and suggested to the public officers this satisfaction as a matter for their consideration. It further appeared that the defendant was not present at Court at the next term after the assault, although the bill was found on the testimony of other witnesses who were present at the assault. It further appeared that the defendant had received the money paid to Doyal :

Held, that there was not, under the law, sufficient evidence to justify a verdict of guilty, especially as it did not appear that the prosecution was, in fact, discontinued, or that Mr. Doyal acted at all on the proposals of Morrow, or that the absence of defendant from Court was in pursuance of any understanding with any one that he should be so absent. *Stancel vs. The State* 152

7. Where there was an indictment for larceny after trust delegated, under section 4358 of Irwin's Revised

Code, and the indictment charged simply that the defendant had fraudulently converted the proceeds of certain sewing machines entrusted to him for sale on commission to his own use, without any allegation of any demand for the money or any charge of a failure to pay :

- Held*, that mere proof that the defendant had used a portion of the money for his own purposes, it not appearing that this was done with any fraudulent intent at the time, does not authorize the conviction of the defendant, nor are the allegations of the indictment sustained by proof of a subsequent failure to pay on demand, unless the circumstances of such failure authorize the conclusion that the original use was with fraudulent intent. *'Snell vs. State.....* 219
8. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial in a criminal case when there have been two verdicts of guilty, and the case turns wholly on the credibility of the witnesses. *Crawford vs. The State.....* 249
9. When there is a verdict of guilty in a criminal case, and a motion is made for a new trial on the sole ground that the verdict is contrary to law and to evidence, and the motion is overruled, this Court will not inquire into the sufficiency of the indictment, no such question having been decided by the Judge. *Jenkins vs. The State.....* 258
10. Privately stealing any goods, etc., over \$50 00 in value, in any house or building, is, by the Act of February 20, 1873, made a felony. Other forms of larceny from the house remain misdemeanors as prescribed by the Act of 1866. *Ibid.*
11. When an indictment charges a larceny from the house of goods over \$50 00 in value, and there is a verdict of guilty, and the evidence justifies the jury in thinking the goods worth over \$50 00, the verdict ought to stand, notwithstanding there is some evidence to show they were worthless. *Ibid.*
12. A verdict of guilt means guilty of the charge as set forth in the indictment. *Ibid.*
13. An indictment charging a defendant with having received a certain amount of money to be applied for the use or benefit of the bailor, with an allegation that on

a certain day the defendant fraudulently converted a specific portion thereof to his own use, is not demurrable on the ground of its being general, vague and indefinite, and that it does not put the accused on notice of what he is called on to answer. It might be that the proof would clearly and definitely show the fraudulent conversion as charged. But under such an indictment, making the general charge of fraudulent conversion, as stated, evidence is not admissible to prove that the accused had reported to the bailor special payments as having been made to particular persons, and that such payments were not in fact made to the amounts so reported, or that there were no such persons as those to whom the payments were reported to have been made. Each of such fraudulent acts would be a crime, and proof thereof would be sufficient to sustain a conviction, and the indictment should contain specific charges of such acts to authorize the admission of evidence showing they had been committed. *Hoyt vs. The State*..... 313

14. Where a defendant is charged with having received money belonging to the State of Georgia to be applied for the use of the Western and Atlantic Railroad in paying for cross-ties, and that he fraudulently converted a portion thereof to his own use, and the defendant files thereto, as a special plea in bar, his plea alleging that after said money had been so received by him, a board of commissioners had been appointed under an Act of the Legislature to audit and approve any claim against said road, and that he, having a large claim against said road, submitted the same to said commissioners; that upon a hearing thereof the money alleged in the indictment as having been received by him was charged up against him by said commissioners, and on a full accounting before said board, a balance was allowed him; and that he then and there fully accounted with said road for all the money set out in the indictment as having been received by him:

Held, that the plea was not a special plea in bar against such an indictment; that, under the Act of the Legislature referred to, the board of commissioners did not have authority to discharge any person from liability for a criminal act. The facts set out in the plea would be admissible under a plea of not guilty, and under

that plea it would be competent for the defendant to show that he did, in fact, fully and fairly settle for such money with said board, and that the State received the benefit thereof by its being deducted from a claim due him by said road. *Ibid.*

15. No officer of the State, or of the Western and Atlantic Railroad, by entrusting another with money belonging to the State, can make such person a bailee or fiduciary agent of the State, and thereby constitute the State the bailor or person so entrusting, etc., within the intent and meaning of sections 4356 and 4358 of the Revised Code. In such a case the person so receiving the money, if he be a private citizen and withholds the same after demand, can only be indicted under the Act of December 14, 1871, and if he be an officer, servant or person employed in any public department, station or office of government of this State, and embezzles, secretes or steals said money, he may be indicted under section 4553 of the Code. *Ibid.*
16. The indictment is not sufficient under the Act of December 14, 1871, because it does not charge the defendant with fraudulently, wrongfully or illegally receiving the money, nor does it charge him with having lawfully received the same and with failing to pay within ten days after a demand, and the indictment was, in fact, found within five days after the demand is alleged to have been made. *Ibid.*
17. Nor is the indictment sufficient under section 4355 of the Code, as it does not charge the defendant to be an officer, servant or person employed in any public department, station or office of government in this State, etc., as prescribed in said action. *Ibid.*
18. A prisoner may be sentenced for the offense of murder, under section 4574 of the Revised Code, in vacation. *Cogswell vs. Schley, Judge*..... 481
19. When one juror, on a trial of an indictment for a felony, has been sworn, and a *nolle prosequi* is then entered, and a new bill found, it is not error that the array with the same juror upon it, is put upon the prisoner; and in such a case the right of challenge, both on the part of the State and the prisoner, is the same as if the former proceedings had not been taken. *Reid vs. The State*..... 556

20. On a trial for murder the Court charged the jury, among other things, that "malice is presumed from the killing, and you should find the defendant guilty unless he has shown by proof such facts and circumstances as will make the killing justifiable, or reduce it to manslaughter." The defendant introduced no witnesses, and relied on the evidence for the prosecution for his defense. The verdict was for manslaughter: *Held*, that the verdict showed that the jury were not misled by the charge as to the right of the defendant to claim an acquittal, or a verdict for a less offense than murder, if the evidence which was before the jury authorized it. *Ibid.*
21. A defendant in a criminal case is not entitled to a copy of the indictment and a list of the witnesses sworn before the grand jury, except upon demand. *Bird vs The State*..... 585 .
22. If no such demand is made, a special plea to the indictment on the ground that the witnesses *whose names are indorsed on the bill* were not sworn before the grand jury, is demurrable. *Ibid.*
23. Nor is it a good plea "that the witnesses upon whose testimony the bill was found, were not sworn *by or before the Court*." *Ibid.*
24. Where such pleas are filed, with the further plea that the witnesses sworn before the grand jury did not have the proper oath administered, this latter plea should set forth the names of the witnesses thus alleged to be improperly sworn. *Ibid.*
25. The Court has the power, on motion of the Solicitor General, before any evidence is introduced, to cause the defendant's witnesses to be sworn and separated. *Ibid.*
26. If such direction be given by the Court, with notice to the defendant that upon his failure or refusal to have his witnesses sworn and separated, they could not be afterwards sworn, and the defendant does so refuse, he is not entitled to have them sworn after the State has closed, except upon special cause shown to be determined by the Court. *Ibid.*
27. The omission by a defendant on a trial for felony to avail himself of the privilege allowed by statute to

make a statement to the jury, is not a matter to be considered by them in determining defendant's guilt, and it is error for the Court to charge, "that the jury may take that fact into consideration, and to give to it such weight as they might see fit, with the other evidence, and if, upon the whole, they should believe him guilty, they should so find—otherwise, not." *Ibid.*

28. An indictment against A for the offense of assault with intent to murder one J. A. Conway, charged the prisoner as principal in the second degree, in being present, aiding and abetting A "by pushing, striking, assaulting and threatening the said J. A. Conway:"

Held, that such words thus descriptive of the acts of A, which constitute the offense of which he is accused, cannot, on motion of prosecuting counsel, without the consent of the prisoner, be stricken from the indictment as surplusage. *Fulford vs. The State..* 591

DAMAGES.

1. It was not error in the Court to refuse to charge the jury that they might take into account the injury to the defendant's iron by General Sherman, and to charge that if they found for the plaintiff they might find the highest proven value of the iron up to the time of the trial. The verdict of the jury was illegal in finding the highest proven value and any interest for the plaintiff. The measure of damages under our law is, as was charged by the Court, and it is not in the power of the jury to find a verdict for such damages, with interest from any date. Unless the plaintiff will remit this verdict for interest, there must be a new trial. *Cent. R. R. & B'g Co. vs. Atlantic & Gulf R. R. Co.....* 444
2. The owner of land taken for the use of the public, is entitled to be paid therefor the value thereof in money; but if, in appropriating his land, consequential damages result to the owner, the benefits which he may have derived from the appropriation, if any, may be set off against such consequential damages, but not against the value of the land. *City Council of Augusta vs. Marks* 612
3. The measure of damages in such a case is the difference between the contract price for the cotton and the value thereof on the day of the breach. *Groover, Stubbs & Co. vs. Warfield & Wayne.....* 644

DEBTOR AND CREDITOR.

1. A purchase, *bona fide* made, by a creditor from his debtor who is in failing circumstances, is not fraudulent simply because the consideration of the purchase is the debt due, and a promissory note, *bona fide* given at the time, for an overplus in the price agreed to be paid above the debt due. *Hobbs vs. Davis*..... 213
2. Pending an action of ejectment the plaintiff filed a bill in equity alleging that the defendant in the action of ejectment was insolvent, and that he had then in his possession certain bags of cotton and a certain lot of corn, made by him on the land, which land the bill charged belonged to the complainant. The bill prayed that the defendant should be enjoined from selling the corn and cotton, and that the same might be put in the hands of a receiver to await the result of the action of ejectment:
Held, that a Court of equity ought not to interfere in such a case. The complainant has no lien, and stands in no respect as to said corn and cotton, better than any other creditor of the defendant. *Walker et al. vs. Zorn* 370
3. Where a creditors' bill was filed against a railroad company and a decree had, adjudicating the dignity and priority of the various claims before the Court, and directing the sale of the road, a creditor, who was a party to such decree, cannot subsequently, but before the distribution of the proceeds of such sale, by an amendment to the original bill, set up a preferred claim, held by him as collateral security for the indebtedness passed upon by such decree. *Clews & Co. vs. Brunswick and Albany R. R. Co. et al.*..... 522
4. An assignment by an insolvent debtor for the benefit of his creditors, provided they would take the property thereby conveyed in full satisfaction of their claims, is not binding on a creditor who refuses to accept the same. *McBride & Co. vs. Bohanan*..... 527

DEED.

1. Where a deed was executed by the complainant to the defendant, a railroad company, conveying to it the right of way through the complainant's land, without embracing any conditions or stipulations as to stock-gaps

- or bridges, a bill to enforce the erection of the same was properly dismissed. *Cook vs. North and South R. R. Co.*..... 211
2. Any admissions by the grantor in a deed going to show a mistake in the deed, are good evidence against the grantor, but such admissions are not conclusive unless acted on by the party seeking to prove them. *Rose vs. West*..... 474
3. Though a deed be produced under notice and inspected by the opposite party, he is not thereby deprived of any right to impeach the deed for fraud or other causes that may avoid it. *Blizzard vs. Nosworthy et al.*..... 514
4. When a tract of land is sold in a body, as containing so many acres, "more or less," and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned. *Walton vs. Ramsey*..... 618
5. A deed purporting upon its face to have been made by the guardian of a minor, under the authority of a decree of the Superior Court, is inadmissible in evidence without the production of said decree. *McCamy, adm'r, vs. Higdon et al.*..... 629
6. The fact that the prescriptive title sought to be established is based upon a quit-claim deed, as color of title, does not of itself negative the presumption of good faith. *Ibid.*

DISTRESS WARRANT.

See *Landlord and Tenant*, 1, 2, 4.

DIVORCE.

Whilst a libel for divorce in favor of the wife is pending, an action against the husband for the counsel fees of the wife in the divorce suit cannot be maintained in a Justice Court. Such a claim is an incident to the wife's right to temporary alimony, and during the pendency of the libel is only cognizable by the Judge of the Superior Court. *Glenn vs. Hill*..... 94

DOWER.

1. A widow is not put to an election between a child's part and dower until there is administration on the

- estate of the husband. Nor does the statute of limitation run against her application for dower if she has remained in possession of the land until the application is made. *Smith vs. King et al.*..... 192
2. Where the widow had a homestead set apart to her and her minor children, out of the lands of her deceased husband, under the Act of 1868, and the same was levied on to satisfy an execution based on a claim contracted prior to the adoption of the Constitution of 1868, she is not barred from claiming her dower in said lands. *Page, adm'r, et al., vs. Page*..... 597

EJECTMENT.

Pending an action of ejectment the plaintiff filed a bill in equity alleging that the defendant in the action of ejectment was insolvent, and that he had then in his possession certain bags of cotton and a certain lot of corn made by him on the land, which land the bill charged belonged to the complainant. The bill prayed that the defendant should be enjoined from selling the corn and cotton, and that the same might be put in the hands of a receiver to await the result of the action of ejectment:

Held, that a Court of equity ought not to interfere in such a case. The complainant has no lien, and stands in no respect as to said corn and cotton, better than any other creditor of the defendant. *Walker et al. vs. Zorn.* 370

ELECTION.

- A widow is not put to an election between a child's part and dower until there is administration on the estate of the husband. Nor does the statute of limitation run against her application for dower if she has remained in possession of the land until the application is made. *Smith vs. King et al.*..... 192

EQUITY.

1. After a bill seeking a discovery has been answered the complainant cannot amend his bill so as to waive discovery, and thus get clear of the defendant's answer. *Allen, adm'r, vs. Woodson, ex'r, et al.*..... 53
2. When a bill was filed against the administrator of a deceased partner seeking an account of certain partner-

ship funds which it was alleged had been collected by the partner and misapplied, and pending the suit and after the 1st of January, 1870, the bill was amended so as to charge in addition, that said deceased partner had also received to his own use the rents of certain real estate belonging to the partnership, and that he had not accounted therefor:

Held, that the amendment did not introduce a new cause of action, but only added an item to the original cause, and if the plea of the statute of limitations was not good to the original suit it was not good to the amendment. *Ibid*.

3. Where an affidavit of illegality was filed to an execution and the issue was pending, and the Judge dismissed the "case and levy for want of prosecution," and the plaintiff attempted afterwards to proceed upon the same levy:

Held, that the levy was dismissed, and equity will enjoin the plaintiff from proceeding in defiance of the judgment of the Court. *Scogin vs. Beall, ex'r*..... 88

4. Where a bill was filed to marshal the assets of an insolvent estate, and among the debts due by the deceased was one due as guardian of his two daughters, both of whom were married at the death of the father, and the husband of one of the daughters was a party to the original bill, charged with wasting the assets to a large amount, and pending these proceedings the two daughters, by their next friend, came in and were made parties by petition, setting up the debt due them by their father, and praying that it should be settled to their sole use, and before any final decree, one of the daughters died, leaving minor children:

Held, that the right to a settlement was sufficiently asserted by the mother during her life-time, to authorize the children to come in by petition and assert the right for their own benefit as survivors. *Polhill, guardian, vs. Neal et al*..... 146

5. A bill showing a good case for equitable interference ought not to be dismissed on demurrer for want of a proper prayer, if there be a general prayer for relief. *Smith vs. King et al*..... 192

6. When the title to land is in tenants in common, and their several interests have become complicated and

- cannot be definitely ascertained and set apart at law, equity will entertain jurisdiction to adjust by one decree the rights of all. *Ibid.*
7. Where a deed was executed by the complainant to the defendant, a railroad company, conveying to it the right of way through the complainant's land, without embracing any conditions or stipulations as to stock-gaps or bridges, a bill to enforce the erection of the same was properly dismissed. *Cook vs. North and South R. Co.*..... 211
 8. Whatever may be the remedies that have been provided by statute against administrators and their securities, the concurrent jurisdiction of equity over the settlement of accounts of administrators is specially retained by section 2600 of the new Code. *Ewing et ux., adm'r and adm'x, vs. Moses, adm'r*..... 264
 9. When an administrator was sued in ejectment, and contracted with an attorney to defend the suit, and agreed to give him one-half the land if the defense was successful, and the attorney so employed procured another attorney to represent him at the trial, and the defense proving successful, the administrator sold the land under an order of the Ordinary, had it bid off for himself and the substituted attorney, and then divided the land between himself and the substituted attorney, and the attorney first employed filed a bill against the administrator and the substituted attorney for a specific performance of the original agreement:
Held, that it was not error for the Chancellor to charge the jury that a bill for specific performance would lie in such a case against the administrator and the substituted attorney. *Stansell vs. Lindsay et al.*..... 360
 10. When a bill was filed to recover of the defendant a parcel of land, and the sole ground for coming into equity was the allegation that the rents and profits were of great value and the defendant was insolvent, and the Chancellor was asked to appoint a receiver and impound the rents and profits until a hearing could be had and a decree rendered, and the prayer for the appointment of a receiver was not insisted on either in vacation or at the first term by any motion to grant the prayer:
Held, that the defendant might, even at the second term,

- move to dismiss the bill for want of equity. *Rose vs. West*..... 474
11. When on the trial of a bill to recover the possession of a parcel of land, the defendant disclaimed title to the land sued for, and denied possession of the same at any time, and the parties went to trial on the issue as to *mesne* profits alone, and it appeared that the complainant claimed under a deed from defendant, which he sought to prove included the land sued for, although the description in the deed showed that if such was the intention there was a mistake in the deed:
Held, that it was improper to allow the jury to consider the question of mistake without some allegations in the bill charging such mistake and praying relief on that ground. *Ibid*.
12. Whether the defendant was indebted for *mesne* profits or not depended entirely on whether she was in possession of plaintiff's land, and this was, as the pleadings stood, dependent on the plaintiff's deed and on the description of the land therein. If that was a mistake, such mistake should have been charged in the bill, so that the true rights of the parties might be ascertained and decided. *Ibid*.
13. Where a creditors' bill was filed against a railroad company and a decree had adjudicating the dignity and priority of the various claims before the Court, and directing the sale of the road, a creditor, who was a party to such decree, cannot subsequently, but before the distribution of the proceeds of such sale, by an amendment to the original bill, set up a preferred claim held by him as a collateral security for the indebtedness passed upon by such decree. *Clews & Company vs. Brunswick & Albany Railroad Company et al*..... 522
14. An attachment was, by mistake, levied on the wrong lot of land. Judgment was entered in pursuance with the levy. The plaintiff filed a bill to correct the mistake. This proceeding was dismissed at the trial term on demurrer:
Held, that such dismissal was error. A Court of equity having obtained jurisdiction, should have proceeded to have heard the case, and have rendered such decree as the ends of justice might have required. *Wardlaw, adm'r, vs. Wardlaw*..... 544

15. A verbal contract between two children, made during the life of the father, by which they sought to avoid the disinherison of one of them, which was threatened by the father should a marriage contemplated by said child take place, by which they agreed to divide the property between them, no matter what might be the parent's will, cannot be enforced in equity on a bill for specific performance. *Mercier vs. Mercier.* 546
16. A creditor of an insolvent estate, who held the vendor's lien on land which had been sold by the administrator, may proceed by bill against the representative of the estate for the assertion of his equitable claim on the proceeds of the sale. *Atkinson vs. Keith, adm'r, et al.*..... 577
17. The creditor's debt was contracted in 1859, and the bill was filed in 1869, originally against the administrator, the purchaser and his vendor, and the widow of the intestate who had taken dower, charging notice of the lien on each, and praying a sale of the land for the discharge of the vendor's lien. By amendments made after January 1st, 1870, all parties defendants were stricken from the bill, except the administrator and the first purchaser, who, it was charged, had not paid for the land. The prayer was also amended, asking judgment on the debt against the administrator, and that the purchaser be decreed to pay his debt due the estate to complainant, and praying an injunction restraining the collection of the debt due by the purchaser:
Held, that no necessity was shown why the purchaser should be a party, or for the relief prayed against him, or for any injunction, and the bill should have been dismissed as to the purchaser. *Ibid.*
18. The amendment to the prayer was a proper amendment, and the bill was not, on account thereof, demurrable on the ground that the relief then prayed was barred by the Act of March 16th, 1869. *Ibid.*

ESTOPPEL.

1. A purchaser of property at an assignee's sale in bankruptcy, under an order of the Register to sell subject to incumbrances generally, is not estopped from denying that a particular incumbrance is a good and valid

incumbrance, and he may show that a mortgage on the property purchased was made by the bankrupt in fraud of his creditors, and is therefore void. *Murray & Co. et al. vs. Jones et al.*..... 109

2. When a suit was brought, May 27th, 1871, on a promissory note due before the 1st of June, 1865, and the defendants pleaded the limitation Act of March 16th, 1869; and the plaintiff replied that he had brought suit before the 1st of January, 1870, but said suit was dismissed by the Court, as appears by the minutes, thus: "Dismissed for want of jurisdiction," and that the present suit was within six months after the dismissal in January, 1871:

Held, that even if that section of the Code, allowing suits to be brought within six months after dismissal, applies to the Act of 1869, yet as the first suit was dismissed for "want of jurisdiction," the plaintiff is estopped from saying said first suit was properly brought, or was, in fact, a pending suit, as the Court had no jurisdiction of it. *Gray, ex'r, vs. Hodge et al.* 262

EVIDENCE.

1. It was not error in the Judge on the trial, to permit the statement of the witness Sibley, that "he had no idea that complainant was a stockholder," taken in connection with the witness' other statements; this is only another mode of stating the recollection of the witness that he was not a stockholder. *Frazer vs. Sibley et al.*..... 96
2. Where the defendant was sued on an account for money placed in his hands as the agent of the plaintiffs, and he pleaded that the plaintiffs had failed to give him credit for \$25,000 00, which had been repaid, it was competent for him to show that he had only discovered this omission upon the trial, and as a reason why it was not discovered earlier, to prove that large sums of money belonging to persons other than the plaintiffs, at the time he was their agent, passed through his hands, all of which money he kept together with that of the plaintiffs, being responsible for the amount charged against him by each firm, and that, though a large discrepancy in his general money balance was observed, yet, as said sum was repaid by

- another, the error was not discovered until it appeared from the evidence. *Glenn et al. vs. Salter*..... 170
3. Where the evidence was conflicting as to what commissions the defendant was to receive as the agent of the plaintiffs in purchasing cotton, it was competent to show the compensation allowed by other parties to their agents engaged in the same business. *Ibid.*
4. Where there was no ambiguity upon the face of the testator's will, parol evidence is inadmissible to raise a latent ambiguity and then to explain it. *Thweatt et al. vs. Redd, ex'r, et al.*..... 181
5. There being no pretence that the writing signed by the parties, either by accident, fraud or mistake, did not embrace the whole terms of the contract, the sayings or declarations of the parties to vary or enlarge the terms of the written contract, were properly excluded. *Cook vs. North & South R. R. Co. et al.*..... 211
6. The order of dismissal cannot be explained by parol, so as to show that the reason given for the want of jurisdiction was a wrong reason, and that in truth the Court did have jurisdiction, and that the suit was therefore duly brought. *Gray, ex'r, vs. Hodge et al.*... 262
7. When a suit pending in the Superior Court was dismissed by order of the Court at March term, 1869, of the Court, and there is nothing on the face of the order to show the ground of its dismissal, it is too late at June term, 1872, to move to have the case reinstated on the ground shown by parol, that the order of dismissal was because the suit was for a slave debt. *Sheppard vs. Whitfield, ex'r*..... 311
8. When a record is shown to be lost or destroyed, its contents may be proven by parol without establishing the lost or destroyed original. *Bridges et al. vs. Thomas, adm'r*..... 378
9. The portion of the answer of the witness Payne, to the second interrogatory which was read to the jury, was not an answer to that part of the interrogatory which was objected to as leading and was properly admitted. The third interrogatory was not leading—nor does the fact that a previous interrogatory was illegal because it was leading—make the balance of the witness' answers to other interrogatories incompetent. *Payne, adm'r, vs. Elyea, adm'r, et al.*..... 395

10. Any admissions by the grantor in a deed going to show a mistake in the deed, are good evidence against the grantor, but such admissions are not conclusive unless acted on by the party seeking to prove them. *Rose vs. West*..... 474
11. A deed purporting upon its face to have been made by the guardian of a minor, under authority of a decree of the Superior Court, is inadmissible in evidence without the production of said decree. *McCamy, adm'r, vs. Higdon et al*..... 629

EXECUTORS. See *Administrators and Executors*.

FACTORS. See *Sales*, 5.

FEES. See *Attorney*, 1, 6, 8, 9.

FRAUDS—STATUTE OF. See *Sales*, 3, 4.

FRAUDULENT CONVEYANCE.

See *Debtor and Creditor*, 1.

GARNISHMENT.

1. When judgment in attachment was rendered against the defendant, but pending the motion to enter judgment against the garnishee, the cause was, on motion of plaintiff's attorney, ordered to be removed to the Circuit Court of the United States, and subsequently the plaintiff sued out a process of garnishment at common law upon said judgment, to which an answer was filed which was traversed, and upon the trial of the issue thus formed a motion was made to dismiss the second garnishment proceedings on the ground that the judgment against the defendant had been carried to the Circuit Court of the United States, and therefore garnishment process could not issue from it, and because there had already been one process of garnishment issued to recover the same debt, whereupon plaintiff's attorney submitted his affidavit to the effect that the Circuit Court had refused to take jurisdiction of said case because the record was not filed on the first day of the Court:

Held, that the motion was properly overruled. *Eagle and Phoenix Man. Co. vs. White, Sheffield & Co.*..... 82

2. A sheriff having collected money for a plaintiff in execution is subject to process of garnishment at the instance of a creditor of said plaintiff. *Gray, sheriff, vs. Maxwell, trustee*..... 108
3. Where a balance of money collected on an execution remained in the sheriff's hands, which he was notified was claimed by the attorney for the plaintiff in *fi. fa.* as his fee, and after such notice judgment was rendered against him on a process of garnishment sued out at the instance of a creditor of said plaintiff, he making no defense, which judgment he satisfied, it was not error in the Court, on the hearing of a rule *nisi* requiring him to show cause why he should not pay over such balance to the plaintiff's attorney, to make the rule absolute. *Ibid.*
4. Where A had a suit pending against B, and had also a summons of garnishment sued out against C, a debtor of B's, and before A's claim against B was carried to judgment, it was agreed in writing by the attorneys of the three parties that the garnishment should be dissolved; that C should pay the amount he owed B over to B's attorney, who, after taking out his fees, should hold the balance subject to A's suit against B, and C paid the money according to the agreement and in good faith:
Held, that the garnishment was dissolved by the payment of the money under the agreement. If the money is not duly held and disposed of under the agreement, A has his remedy by rule against the attorney receiving the money, but the garnishee who has in good faith paid his money, is discharged. *Platen vs. Byck*. 245
5. When the garnishee failed to answer through a mistake as to his legal duty, and judgment was rendered against him for a much larger sum than he had in hand, the discretion of the Court in setting aside the same, on motion made during the term, will not be controlled. *Russell vs. Freedman's Savings Bank*..... 575

GUARDIAN AND WARD.

1. A ward after he has attained the age of fourteen years, has the right to choose his guardian, and for that purpose to have the letters of guardianship issued under the appointment of the Ordinary to a former guardian, revoked. *Bryce vs. Wynn*..... 332

2. Before such order of revocation is granted, a selection of the successor in the guardianship should be made, which selection must be judicious in the judgment of the Ordinary, and the person chosen should give his consent to his appointment. *Ibid.*
3. An application was made by a ward over fourteen years of age, for the revocation of the letters of her guardian, and to be allowed to select a guardian subject to the approval of the Ordinary. On the hearing the Ordinary discharged the rule against the guardian to show cause, etc., on the ground that there was "no sufficient cause shown for the removal of the defendant." On a second application by the ward for the same purpose, which was carried by consent appeal to the Superior Court, the judgment of the Ordinary was pleaded as former recovery in bar, and it was so adjudged by the Court:

Held, that the decision of the Ordinary will not be construed as an adjudication of the right of the minor to have the letters of guardianship revoked and to select her guardian, but rather that the refusal of the Ordinary to grant the revocation was because there had been, in his judgment, no "judicious selection" of a successor who would consent to act. If, on the second trial, such "judicious selection" be shown to the satisfaction of the jury, and the person chosen consents to accept, the application should be allowed. *Ibid.*

HOMESTEAD.

1. Act of 1868 is unconstitutional as against antecedent debts. *Chambliss vs. Jordan*..... 81
2. Where a homestead was set apart under the Act of 1868 and was afterwards levied on to satisfy a *fi. fa.* founded on a debt contracted before 1868, the husband, or, on his failure, the wife may apply for an exemption, under the law as it stood before the debt was contracted, and the exemption, if obtained before the sale under the levy, is a valid exemption against the judgment so levying. *Larence et al. vs. Evans*..... 216
3. Though a defendant has had set apart to him a homestead under the Act of 1868, which has failed as against debts contracted prior to July 21st, 1868, on account of the unconstitutionality of said Act, he may never-

- theless claim the homestead allowed under the Code.
Whittington vs. Colbert, adm'r..... 584
4. Where the widow had a homestead set apart to her and her minor children out of the lands of her deceased husband, under the Act of 1868, and the same was levied on to satisfy an execution based on a claim contracted prior to the adoption of the Constitution of 1868, she is not barred from claiming her dower in said lands. *Page, adm'r, et al. vs. Page*..... 597
5. A homestead, set apart to the defendant in execution, under the Act of 1868, though conveyed to the claimant with the approval of the Ordinary, is nevertheless subject to a judgment against said defendant, rendered before the passage of said Act. *Smith vs. Whittle. Durden, adm'r, vs. Whittle*..... 626

HUSBAND AND WIFE.

1. Whilst a libel for divorce in favor of the wife is pending, an action against the husband for the counsel fees of the wife in the divorce suit cannot be maintained in a Justice Court. Such a claim is an incident to the wife's right to temporary alimony, and during the pendency of the libel, is only cognizable by the Judge of the Superior Court. *Glenn vs. Hill*..... 94
2. A wife's share of her deceased father's real estate not distributed, but remaining undisposed of between the heirs, the same being wild lands, is not so in possession of the husband as to bar the wife's right of survivorship, if he die before it is distributed or divided. *Hooper vs. Howell, guardian*..... 165
3. When a married woman ordered from the milliner a hat at the price of \$12 50, informing the milliner that it was intended as a present to a friend, but when the hat was finished she refused to take it, and suit was brought against her husband for the price of the hat; and on the trial it appeared that the wife was fully supplied with hats; that she was in the habit of paying her own bills, and that he had no knowledge of the transaction:
Held, that the husband was not liable for the price of the hat. *Sulter vs. Mustin*..... 242

ILLEGALITY.

1. Where an affidavit of illegality was filed to an execution, and the issue was pending, and the Judge dismissed the "case and levy for want of prosecution," and the plaintiff attempted afterwards to proceed upon the same levy :
Held, that the levy was dismissed, and equity will enjoin the plaintiff from proceeding in defiance of the judgment of the Court. *Scogin vs. Beall, ex'r*..... 88
2. Where there have been two judgments of the Court on illegalities to an execution, both ordering the same to proceed as a valid execution, it is too late for the defendant to set up a new defense to the execution which existed before the judgments and of which he was fully informed at the time of the judgments.
Field, adm'r, vs. Price..... 135
3. An affidavit of illegality to an execution setting up facts as a reason why the execution is proceeding illegally, must distinctly present the matter relied upon, so that, if not denied, the Court may pass judgment intelligently, or if denied, that the jury may have distinctly before it the matter in issue. *Sharp vs. Kennedy*..... 208
4. When a judgment was obtained against one as administrator of an estate, and the subsequent representative of the same estate filed an affidavit of illegality against the execution issued on such judgment, on the ground that the defendant in execution was not the legal administrator at the date of the judgment or since, the affidavit should set forth the facts which show that the title of such defendant to the office of administrator was illegal. *McLaren, adm'r, vs. Beall*..... 632
5. A ground taken in an affidavit of illegality that the execution "issued upon a *bogus* judgment, which was not obtained after a due course of law, but was obtained in chambers, contrary to the statute in such cases made and provided, and by fraud," is too general and indefinite, and does not show that the judgment is void, and therefore cannot be inquired into in a proceeding by illegality. *Ibid.*
6. On a trial of an affidavit of illegality the affiant, in support of one of the grounds taken, introduced the

former administrator as a witness, who testified that he had paid \$3,400 00 on the debt, and that no credit had been given for it. Upon the attention of the witness being called to the original decree, and papers connected therewith, he admitted that he was mistaken :

Held, that notwithstanding the witness admitted the mistake on the trial, yet his being willing so to testify furnished a reason for filing the affidavit sufficient to relieve a succeeding representative from the charge of interposing it for delay only, and especially under such a state of facts, twenty per cent. damages should not have been given. *Ibid.*

IMPRESSMENT. See *War*, 1.

INDICTMENT.

See *Criminal Law*, 13, 15, 16, 17, 27.

INDORSEMENT.

The indorsement on the bonds by "Alfred Shorter, President Georgia and Alabama Railroad Company," passed the title in the bonds to the holder. The bonds being issued for purposes of negotiation, this was a sufficient indorsement to put them in circulation, notwithstanding the charter of the railroad company required a different mode of making and signing ordinary contracts to bind the company. *Commissioners of Roads, etc., vs. Shorter* 489

INFERIOR COURT. See *County Matters*, 2-5.

INJUNCTION.

1. Complainant charges in his bill that the defendant has erected a dam across a stream, which causes the water to overflow complainant's land lying on the stream above this dam ; that he has, at law, recovered nominal damages for the injury thereby done, and has other suits pending for the same wrong. Amongst other grounds, he also charges that defendant is preparing to erect a mill near the dam, but does not charge or show that the damage to him will thereby be increased. Besides the prayer for a decree that the proper height of the dam shall be determined and fixed, and the

prayer for general relief, he asks for an injunction restraining defendant from continuing the dam at its present height, or any height that will cause the water to overflow his land, or from building a mill, or raising said dam, or doing any act that will, in any way, tend to cause the dam to continue as it now stands. The Chancellor granted an injunction enjoining defendant from raising the dam higher, or from doing any act that will strengthen it at its present height, or make it more permanent than it now is:

Held, that as there is no charge in the bill, and no proof at the hearing of an intention or threat of defendant to increase the height of the dam, and defendant made affidavit that none such existed, no necessity for the injunction on that point was shown. *Wheeler vs. Steele*, 34

2. As all the rights of the parties may be adjusted at the final hearing, and the height of the dam be fixed by a decree, so that there can be no further damage to complainant, the defendant should not, in the meantime, be disabled from protecting the dam against destruction by high water or other accidents, which is done by the injunction as granted. *Ibid*.

3. Pending an action of ejectment the plaintiff filed a bill in equity alleging that the defendant in the action of ejectment was insolvent, and that he had then in his possession certain bags of cotton and a certain lot of corn, made by him on the land, which land the bill charged belonged to the complainant. The bill prayed that the defendant should be enjoined from selling the corn and cotton, and that the same might be put in the hands of a receiver to await the result of the action of ejectment:

Held, that a Court of equity ought not to interfere in such a case. The complainant has no lien, and stands in no respect as to said corn and cotton, better than any other creditor of the defendant. *Walker et al. vs. Zorn* 370

4. A Court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case the nuisance being purely a public one, can only be restrained by the public, on information filed by a public officer, to-wit:

by the Solicitor General for the Circuit. *Coast Line R. R. Co vs. Cohen et al.*..... 451

5. Nor is it sufficient that one of the parties is a lot owner on the street, no specific injury to said property being alleged, but only a general allegation that damage will result to said lot. *Ibid.*
6. A railroad company was chartered, with the privilege of running its road from such point within the limits of the city of Savannah as the Mayor and Council of the city should designate, and from thence to the sea coast, by certain cemeteries outside of the city, but used by the citizens for the burial of their dead. The Mayor and Council fixed the initial point considerably within the city, and passed an ordinance permitting the company to lay down its track from such initial point through certain streets and squares on the route from such point by said cemeteries in the direction prescribed by the charter, and to run horse cars thereupon :

Held, that such permission was within the authority of the Mayor and Council over the streets and squares of the city, and under its charter the company might, with such authority, so use the streets, not obstructing them permanently by excavations or embankments, and leaving them conveniently passable, except by the passage of the cars. Under such limitations no public nuisance will be created, and no grounds for an injunction by the public exist. *Ibid.*

7. A refusal of an injunction does not bar the complainant from making a second application when he presents new and additional matter discovered since the former hearing. *Blizzard vs. Nosworthy et al.*..... 514
8. There was no abuse of discretion by the Chancellor in hearing the second application and in granting the injunction, provided the same be construed as restraining the trial of the ejectment case until a final hearing of the bill, with the right of the parties to a trial of both cases together. *Ibid.*

INSURANCE.

1. Where an applicant for life insurance signs an application for a policy which contains a statement that "only the home officers of the company, in Macon,

Georgia, have authority to determine whether or not a policy shall issue on application," and the agent through whom the application is made gives a receipt to the applicant as follows: "Received of James R. Scurry \$375 00, the same being in payment of insurance in the Cotton States Insurance Company. This receipt being binding on said company until the policy is received." Such contract or receipt is not binding on the company to issue a policy, nor is the company bound by the receipt after the application is rejected. Whether it is binding on the company until action is had by the company on the application, is a question that does not arise under the facts of this case. *Cotton States Life Ins. Co. vs. Scurry et al.*..... 48

2. Where insurance was effected in a mutual life insurance company on the life of the husband of complainant for her benefit, upon the ten year plan, with the option to the assured that after two annual payments, should she wish to discontinue, the company will issue to her a paid up policy for as many tenths of the amount originally insured as there have been annual premiums paid in cash, and the premiums were paid part in cash and part in notes, with the stipulation that the dividends in the profits should be applied to the payment of the notes:

Held, that the assured was not entitled after the payment of the second annual premium as aforesaid, to a paid up policy for two-tenths of the amount originally insured, until the liquidation in cash of the notes given in part of premiums, after crediting thereon the dividends already accrued. *Moses vs. Brooklyn Life Ins. Co.*..... 196

3. William A. Gober made application to the Security Life Insurance Company, through its agent at Greensboro, for a life policy on his life in favor of his wife and children. The application sought a life policy for \$5,000 00, premiums payable annually. The application was dated 10th August, 1870. On receiving the application for transmission to the company, the agent gave to Gober a receipt acknowledging the payment of \$99 15, the cash portion of the first premium, and stipulating that Gober was entitled to a life policy for \$5,000 00, as of the age of thirty-seven, if the company accepted his application, the company to be in

that case bound from the date of his examination. If the company did not accept, the money was to be returned and the receipt canceled. There was, in fact, no money paid, but the agent took Gober's note for the \$99 15, payable to himself in six months. The company accepted the application and issued the policy and sent it to the agent. The policy was not delivered to Gober, nor does he seem to have got formal notice of the acceptance of his application and the issue of the policy. The agent swore that he took the note as cash, but that he did not intend to deliver the policy till the note was paid, though it does not appear that he informed Gober of this. The note was not paid at maturity; but after it was due the agent demanded it, and informed Gober that if he did not pay he would lose his interest in the company. The policy was dated 29th August, 1870, and in it the premiums were declared due each year on that day, and if not paid the policy was to cease. Gober did not pay his note, nor did he pay the second premium. On the 16th of September, 1871, Gober died:

Held, that whatever may be the liability of the company under the facts if Gober had died before the 29th of August, 1871, yet, as the company was only liable according to the policy, and as the second premium was unpaid, the insurance ceased after the 29th of August, 1871. *The Security Life Ins. and An. Co. vs. Gober.* 414

4. That Gober did not know the precise terms of the policy, if he did not, was his own fault, as he could have known had he applied to the agent for the same, and he was also charged with notice that the liability of the company for the second year was dependent on his payment of the second premium. *Ibid.*

INTEREST.

The verdict of the jury was illegal in finding the highest proven value and any interest for the plaintiff. The measures of damages under our law is, as was charged by the Court, and it is not in the power of the jury to find a verdict for such damages, with interest from any date. Unless the plaintiff will remit this verdict for interest, there must be a new trial. *Central Railroad and Banking Company vs. Atlantic and Gulf Railroad Company*..... 444

INTERROGATORIES. See *Evidence*, 9.

JUDGMENTS.

1. The certificate of the former owner of a judgment, given since its assignment, that she had on due reflection become satisfied that said judgment was wrong, and that she was mistaken when the case was pending in Court, cannot affect the rights of the assignee. *Lindrum et al. vs. Robson* 44
2. When a suit was brought against Robert Campbell as a stockholder in a corporation, on his statutory liability for a debt due by the corporation, and the process was returned served by the sheriff thus: "Served the within by leaving a copy at the residence of Robert Campbell," and the defendant not appearing, a verdict and judgment was taken against Robert Campbell, and an execution for the same being levied on the property of Robert Campbell, he filed his bill in equity, alleging that he never had been a stockholder in said company, but that there was another Robert Campbell of the county who was such stockholder, and alleging further that he had no notice of said suit, and that if a copy was left at his residence he did not get it or have any knowledge of it, and praying that the judgment should be enjoined against him. On the trial it was proven by the sheriff that he had left the writ at the residence of the present complainant, and this was all the proof *pro* or *con* on the subject of service, but the complainant showed by Mr. Sibley that he had not been a stockholder in said company, but that the other Robert Campbell was a stockholder:
Held, that it was error in the Judge to charge the jury that the judgment did not conclude the complainant, unless he was personally served with the process. *Frazer vs. Sibley et al., ex'rs.*..... 96
3. As there was no affirmative evidence on the trial to show which Robert Campbell the plaintiff had intended to sue, and the complainant having been duly served with process in that suit according to law, it was his duty to appear and defend the same, and having failed so to do he is concluded by the judgment, it being the legal presumption that it was made to appear on that trial that the defendant then served was a stockholder, as charged in the declaration, and the jury

- should in this case have found against the complainant unless it had been made to appear that the verdict in the other suit was obtained by perjury or by taking a verdict without proof (as in case of a judgment by default) of anything but the original judgment. *Ibid.*
4. Two cases were pending between the same parties. They were submitted together to the Court upon an agreed statement of facts. The Court dismissed one case and allowed a judgment to be taken in the other. The plaintiffs excepted to said judgment, and brought the same for review to this Court, and obtained a reversal. The legal effect of this reversal was to leave no judgment in the Superior Court, and to place the parties in the same position in which they were before the submission. *Finney vs. Tommey & Stewart*..... 140
 5. Where there is no evidence that the defendant was in possession of property before or after the judgment was rendered against him, and no title was shown in him, the fact that he conveyed the same by deed subsequent to said judgment, and possession was taken thereunder by the vendee, does not render the property liable thereto. *Wimberly, trustee, vs. Collier*..... 144
 6. The 4th and 29th sections of the Act of 1856 prescribing that after seven years, without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property for four years it shall be discharged from the lien of any judgment against the person from whom he purchased, were parts of a statute of limitations in force on the 30th of November, 1860, and were, by the terms, spirit and intention of the Act of that date, suspended, and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war. *Solomon et al. vs. Hinton et al.*..... 163.
 7. The order of dismissal cannot be explained by parol, so as to show that the reason given for the want of jurisdiction was a wrong reason, and that in truth the Court did have jurisdiction, and that the suit was therefore duly brought. *Gray, ex'r, vs. Hodge et al.*..... 262
 8. At the December term, 1866, of Clay Superior Court, the plaintiff obtained a judgment against the defendants. At the September term, 1869, the Court "ordered

- that the same be set aside and forever annulled and made void" upon the ground that it appeared that the consideration upon which it was founded "was a note given for slaves." At the September term, 1872, the plaintiff moved to set aside the last order. The motion should have been sustained. *Prescott vs. Bennett et al.* 266
Kelly vs. Brooks et al...... 582
9. The judgment rendered at the September term, 1869, vacating the judgment of 1866, on the ground that it was founded on a note given for slaves, was a mere usurpation of power by the Court without any authority of law, and may be declared a nullity collaterally, without any direct proceedings to revise it. *Ibid.*
10. It is apparent from the several provisions of the Code in relation to setting aside judgments that parties would not be without a remedy, although they might not have excepted to the same within thirty days after their rendition. *Ibid.*
11. At the September term, 1869, of Lee Superior Court, an order was passed dismissing plaintiff's suit because the consideration of the note sued on was a slave. At the November term, 1872, a motion was made to reinstate the case. The note sued on was dated January 3d, 1863, and due January 1st, 1864. As this motion was not made until nearly three years after the note sued on was barred by the statute of limitations, nor within three years from the time the order of dismissal complained of was passed; therefore, whether under the right granted by section 3530 of the Code, the words "within the statute of limitations" be construed to mean three years, in analogy to the statute prescribing that period as the time within which a bill for a new trial must be brought, or to mean that period within which the plaintiff's cause of action would be barred, this motion was not made in time, and was properly overruled. *Tison, adm'r, vs. McAfee et al.*... 279
12. An order of the Judge of the Superior Court dismissing a suit pending in said Court, is not void because the reason given in the order is not a good legal reason. *Arnold vs. Kendrick, adm'r.*..... 293
13. When a suit was dismissed by an order of the Judge, and it appears that the Judge was mistaken in the fact upon which his judgment of dismissal was based, and

the plaintiff made no motion to reinstate until the second term after the dismissal, and he shows no excuse for his delay in looking after his cause, he is too late to move to reinstate, and especially is this true if he have notice of the dismissal shortly after the order was passed. *Ibid.*

14. If a pending suit be dismissed by an order of the Court, and it appears that the ground mentioned in the order is untrue in fact, and a motion to reinstate shows upon its face that though the reason given was not true, yet that there was in fact a good reason subsisting at the time why the case should have been dismissed, there is no error in refusing to reinstate. *Ibid.*

15. When a suit pending in the Superior Court was dismissed by order of the Court at March term, 1869, and there is nothing on the face of the order to show the ground of its dismissal, it is too late at June term, 1872, to move to have the case reinstated on the ground, shown by parol, that the order of dismissal was because the suit was for a slave debt. *Sheppard vs. Whitfield, ex'r*..... 311

16. An application was made by a ward over fourteen years of age for the revocation of the letters of her guardian, and to be allowed to select a guardian, subject to the approval of the Ordinary. On the hearing the Ordinary discharged the rule against the guardian to show cause, etc., on the ground that there was "no sufficient cause shown for the removal of the defendant." On a second application by the ward for the same purpose, which was carried by consent appeal to the Superior Court, the judgment of the Ordinary was pleaded as former recovery in bar, and it was so adjudged by the Court:

Held, that the decision of the Ordinary will not be construed as an adjudication of the right of the minor to have the letters of guardianship revoked and to select her guardian, but rather that the refusal of the Ordinary to grant the revocation was because there had been, in his judgment, no "judicious selection" of a successor who would consent to act. If, on the second trial, such "judicious selection" be shown to the satisfaction of the jury, and the person chosen consents to accept, the application should be allowed. *Bryce vs. Wynn*..... 332

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17. Where the judgment of this Court has been reversed upon writ of error to the Supreme Court of the United States, the judgment of said tribunal will, on motion, be made the judgment of this Court. *Walker vs. Whitehead*..... 484
18. Where an attorney recovers different parcels of land for his client, under a written agreement that the attorney should have a particular lot so recovered for his services, and there is no evidence of fraud, or that the services were not worth what was contracted for, the attorney, under section 1979, Revised Code, can claim such lot against the lien of a judgment existing against his client at the time the agreement was made, the more especially if the creditor never sought to enforce his judgment against the land until subsequent to its recovery, after a protracted litigation on the part of defendant and his attorney. *Walton vs. Little* 599

JUDICIAL SALE.

See *Levy and Sale*.

" *Administrators and Executors*, 8, 9, 10, 14.

JURISDICTION.

1. Whilst a libel for divorce in favor of the wife is pending, an action against the husband for the counsel fees of the wife in the divorce suit cannot be maintained in a Justice Court. Such a claim is an incident to the wife's right to temporary alimony, and during the pendency of the libel is only cognizable by the Judge of the Superior Court. *Glenn vs. Hill*..... 98
2. Justices of the Peace have not jurisdiction, under the provisions of the 4023d section of the Code, to abate as a nuisance a bridge constructed by a railroad company over a navigable stream. *Macon and Brunswick R. R. Co. vs. The State, ex rel.*..... 156

JURY. See *Criminal Law*, 19.

JUSTICE OF THE PEACE.

See *Jurisdiction*, 2.

LANDLORD AND TENANT.

1. Under the general law of January 19th, 1872, the Judge of the County Court has authority to issue dis-

- tress warrants, and there is nothing in the Act organizing a County Court for Dougherty county inconsistent with such an authority in the County Judge of that county, so that he also has authority to issue distress warrants. *Graves vs. Tifts*..... 122
2. Where a levy under an illegal distress warrant is dismissed, the Court has no authority to retain the case until a new warrant can be issued. *Ibid.*
3. The lien of a landlord upon the property of his tenant for rent does not attach as against a purchaser from the tenant until the issue of a distress warrant, except upon the crop made upon the premises. *Hobbs vs. Davis*..... 213
4. Where a distress warrant was sued out for rent, and a counter-affidavit was filed denying that the defendant held the premises from the plaintiff, either by lease or rent, and also that he owed the plaintiff any rent, a verdict as follows: "We, the jury, find the issue for the plaintiff," was sufficiently certain, and covered the issue made by the pleadings. *Rickerson vs. Flowers*..... 215
5. A tenant occupied a store-room from September, 1870, to December, 1871. In September, 1870, it was agreed between him and the landlord that he, the tenant, should have the store repaired, and the cost thereof should be deducted from the rent, and the repairs were then made. In December, 1870, he gave the landlord his note, expressing therein that it was for the rent of the store-room he then occupied, to be paid quarterly. The Court was requested by defendant to charge the jury, that the agreement as to the repairs rebutted the presumption of law that the giving of a note was evidence that there had been a settlement of accounts :
Held, that the refusal of the Court so to charge was not error. *Broughton vs. Thornton, adm'r*..... 568
6. The evidence does not sufficiently show that the damages were caused by the leaking of the store during the year 1871 to authorize this Court to grant a new trial because the jury did not allow for them in the verdict. *Ibid.*
7. Prior to the Act of 1873, the landlord, in the absence of any contract to that effect, had no lien on the crops

of the tenant for his rent, before the levy of a distress warrant therefor. *Johnson vs. Emanuel*..... 590

LAWS.

1. The County Court Act of January 19th, 1872, is a general law of the State, except as therein specially excepted; and the Act of August 24th, 1872, establishing a County Court in the counties of Dougherty and Lee only repeals the Act of 19th January, 1872, so far as it is inconsistent therewith. *Graves vs. Tifts*..... 122
2. Where an Act was passed by the Legislature in the year 1872, "for the removal of the county site of Lee county, to compensate the owners of real estate at Starksville, and for other purposes," the body of which was in accordance with its title, and in 1873 a second Act was passed, the title to which was as follows: "An Act to amend an Act to authorize the Ordinary of Butts county to issue bonds to raise money to build a Court-house, and to authorize the commissioners to remove the county site of Lee county, to issue bonds of said county to build a Court-house and jail at the new county site of said county of Lee, and for other purposes:"
Held, that the two Acts in relation to the county of Lee should be construed together as one Act; and thus construed, the removal of the county site of Lee county, and the provision for the payment of the cost of such removal incident to the erection of the public buildings at the new site, cannot be said to be more than one subject matter as contemplated by the Constitution. *Allen et al., vs. Tison et al.*..... 374
3. Statutes under which exemption from taxation is claimed by corporations, will be strictly construed, and the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the Legislature. *Mayor and Council of Macon vs. Central R. R. and Banking Co.*..... 620

LEGACY. See *Wills*, 1, 2, 4.

LEVY AND SALE.

1. If there be no newspaper published in the county in which land is levied on for sale, it becomes the duty

- of the sheriff to publish notice thereof in the nearest newspaper having the largest or a general circulation in such county. In the latter case notice need not be published at any place in said county. *Lamb, adm'r, vs. Allen, ex'r*..... 207
2. Where there is a levy upon land entered by the sheriff upon an execution, but by mistake the entry is not signed by the sheriff, the failure to sign is not fatal to the levy. The sheriff may amend it by adding his signature. *Sharp vs. Kennedy*..... 208
3. Where land is levied on as the property of A, and is claimed by B under our claim laws, the pendency of the claim does not make it illegal for other judgment creditors of A to levy on and sell the land at sheriff's sale. *Walker et al. vs. Zorn*..... 370
4. In order to pass the title to land by a sale by the city marshal of Americus, under a *fi. fa.* for city taxes, it is necessary that all the requirements of the city charter should be fully met, and if there be a failure to advertise the sale for thirty days, as required by the charter, the sale is void. *Ansley et. al. vs. Wilson, trustee*..... 418
5. A levy upon land in this State is made by an entry by the levying officer upon the *fi. fa.*, and an entry by a city marshal on a city tax *fi. fa.*, "Levied this *fi. fa.* on a house and lot of the defendant, situated in the eastern part of the city of Americus, to satisfy the within," is not a sufficiently definite entry to give the marshal authority to sell a lot which the defendant happens to own in that part of the city; nor can such an entry by a city marshal be amended after the sale by adding a description sufficient to identify the property intended to be seized. *Ibid.*
6. Where lot two hundred and eighty-seven is intended to be levied on by an attachment, but the entry of the sheriff describes lot two hundred and sixty-eight by mistake, there has been in fact no levy made on the right lot. *Wardlaw, adm'r, vs. Wardlaw*..... 544

LIBEL. See *Slander*.

LICENSE. See *Municipal Corporations*, 1, 2, 11.

LIEN.

1. The lien of a landlord upon the property of his tenant for rent does not attach as against a purchaser from the tenant until the issue of a distress warrant, except upon the crop made upon the premises. *Hobbs vs. Davis*..... 213
2. Pending an action of ejectment the plaintiff filed a bill in equity alleging that the defendant in the action of ejectment was insolvent, and that he had then in his possession certain bags of cotton and a certain lot of corn made by him on the land, which land the bill charged belonged to the complainant. The bill prayed that the defendant should be enjoined from selling the corn and cotton, and that the same might be put in the hands of a receiver to await the result of the action of ejectment :
Held, that a Court of equity ought not to interfere in such a case. The complainant has no lien, and stands in no respect, as to said corn and cotton, better than any other creditor of the defendant. *Walker et al. vs. Zorn* 370
3. An inn keeper has no lien on the goods in possession of his guest, as against the true owner, unless there be charges upon the specific article on which the lien is claimed. *Domestic Sewing Machine Co. vs. Watters*. 573
4. A creditor of an insolvent estate who held the vendor's lien on land which had been sold by the administrator, may proceed by bill against the representative of the estate for the assertion of his equitable claim on the proceeds of the sale. *Atkinson vs. Keith, adm'r, et al.*..... 577
5. Prior to the Act of 1873 the landlord, in the absence of any contract to that effect, had no lien on the crops of the tenant for his rent before the levy of a distress warrant therefor. *Johnson vs. Emanuel*..... 590
6. Where an attorney recovers different parcels of land for his client under a written agreement that the attorney should have a particular lot so recovered for his services, and there is no evidence of fraud, or that the services were not worth what was contracted for, the attorney, under section 1979, Revised Code, can claim such lot against the lien of a judgment existing

against his client at the time the agreement was made, the more especially if the creditor never sought to enforce his judgment against the land until subsequent to its recovery after a protracted litigation on the part of defendant and his attorney. *Walton vs. Little* 599

LIMITATIONS—STATUTE OF.

1. When a bill was filed against the administrator of a deceased partner seeking an account of certain partnership funds which it was alleged had been collected by the partner and misapplied, and pending the suit and after the 1st of January, 1870, the bill was amended so as to charge, that said deceased partner had also received to his own use the rents of certain real estate belonging to the partnership, and that he had not accounted therefor:
Held, that the amendment did not introduce a new cause of action, but only added an item to the original cause, and if the plea of the statute of limitations was not good to the original suit it was not good to the amendment. *Allen, adm'r, vs. Woodson, ex'x, et al.*..... 53
2. The 4th and 29th sections of the Act of 1856, prescribing that after seven years, without an entry, etc., a judgment shall not be enforced, but shall be presumed to be satisfied, and also that where a *bona fide* purchaser has been in the possession of real property for four years 'it shall be discharged of the lien of any judgment against the person from whom he purchased, were parts of a statute of limitations in force on the 30th of November, 1860, and were, by the terms, spirit and intention of the Act of that date, suspended, and by the various Acts from 1860 to 1865, the suspension was continued until the close of the war. *Solomon et al. vs. Hinton et al.* 163
3. A widow is not put to an election between a child's part and dower until there is administration on the estate of the husband. Nor does the statute of limitation run against her application for dower if she has remained in possession of the land until the application is made. *Smith vs. King et al.* 192
4. When a suit was brought, May 27th, 1871, on a promissory note due before the 1st of June, 1865, and the defendants pleaded the limitation Act of March 16,

1869; and the plaintiff replied that he had brought suit before the 1st of January, 1870, but said suit was dismissed by the Court, as appears by the minutes, thus: "Dismissed for want of jurisdiction," and that the present suit was within six months after the dismissal in January, 1871:

Held, that even if that section of the Code, allowing suits to be brought within six months after dismissal, applies to the Act of 1869, yet, as the first suit was dismissed for "want of jurisdiction," the plaintiff is estopped from saying said first suit was properly brought, or was, in fact, a pending suit, as the Court had no jurisdiction of it. *Gray, ex'r, vs. Hodge et al.*..... 262

5. The order of dismissal cannot be explained by parol, so as to show that the reason given for the want of jurisdiction was a wrong reason, and that, in truth, the Court did have jurisdiction, and that the suit was therefore duly brought. *Ibid.*
6. At the December term, 1866, of Clay Superior Court, the plaintiff obtained a judgment against the defendants. At the September term, 1869, the Court "ordered that the same be set aside and forever annulled and made void" upon the ground that it appeared that the consideration upon which it was founded "was a note given for slaves." At the September term, 1872, the plaintiff moved to set aside the last order. The motion should have been sustained. *Prescott vs. Bennett et al.*..... 266
Kelly vs. Brooks et al...... 582

7. The judgment rendered at the September term, 1869, vacating the judgment of 1866, on the ground that it was founded on a note given for slaves, was a mere usurpation of power by the Court without any authority of law, and may be declared a nullity collaterally without any direct proceedings to revise it. *Ibid.*
8. It is quite apparent from the several provisions of the Code in relation to setting aside judgments, that parties would not be without a remedy, although they might not have excepted to the same within thirty days after their rendition. *Ibid.*
9. At the September term, 1869, of Lee Superior Court, an order was passed dismissing plaintiff's suit, because the consideration of the note sued on was a slave. At

- the November term, 1872, a motion was made to reinstate the case. The note sued on was dated January 3d, 1863, and due January 1st, 1864. As this motion was not made until nearly three years after the note sued on was barred by the statute of limitations, nor within three years from the time the order of dismissal complained of was passed; therefore, whether under the right granted by section 3530 of the Code, the words "within the statute of limitations" be construed to mean three years, in analogy to the statute prescribing that period as the time within which a bill for a new trial must be brought, or to mean that period within which the plaintiff's cause of action would be barred, this motion was not made in time, and was properly overruled. *Tison, adm'r, vs. McAfee et al....* 279
10. When a suit was dismissed by an order of the Judge, and it appears that the Judge was mistaken in the fact upon which his judgment of dismissal was based, and the plaintiff made no motion to reinstate until the second term after the dismissal, and he shows no excuse for his delay in looking after his cause, he is too late to move to reinstate, and especially is this true if he have notice of the dismissal shortly after the order was passed. *Arnold vs. Kendrick, adm'r.....* 293
11. When a suit pending in the Superior Court was dismissed by order of the Court at March term, 1869, of the Court, and there is nothing on the face of the order to show the ground of its dismissal, it is too late at June term, 1872, to move to have the case reinstated on the ground shown by parol that the order of dismissal was because the suit was for a slave debt. *Sheppard vs. Whitfield ex'r.....* 311
12. An account was contracted and due in September, 1862. Administration was granted on the estate of the debtor in September, 1869, it not appearing in the record when he died. Suit was instituted on the account in October, 1871:
- Held*, that the action was barred by the statute of limitations of March 16th, 1869. Even though the plaintiff may not have been entitled to have brought suit against the administrator by the first of January, 1870, (which we do not determine) the spirit and equity of the statute require that it should have been commenced within a period after twelve months from the

- grant of administration, which was equal to the time allowed by the statute for bringing suits on such debts, to-wit: from the date of the passage of the Act to the first of January, 1870. *The Moravian Seminary, etc. vs. Atwood et al., adm'rs*..... 382
13. The amendment to the prayer was a proper amendment, and the bill was not, on account thereof, demurrable on the ground that the relief then prayed was barred by the Act of March 16th, 1869. *Atkinson vs. Keith, adm'r, et al.*..... 577

MASTER AND SERVANT.

- One engaged in selling and delivering wood to the proprietor of a mill at so much per cord, is not an employee of the proprietor, so as to put him in the situation of one who takes the risk upon himself of negligence in those running the mill. *Wadsworth, Williams & Company vs. Duke*..... 91

MISTAKE. See *Equity*, 11, 12, 14.

MORTGAGE.

1. When a promissory note is made in South Carolina, payable on its face at Charleston, to a citizen of South Carolina, it is a South Carolina contract, notwithstanding the maker lives in Georgia, and notwithstanding at the time of the making of the note the maker also executes a mortgage to secure it on goods situated in Georgia, the residence of the mortgagor. *Goodrich et al. vs. Williams*..... 425
2. A mortgage is not illegally foreclosed because the affidavit of the mortgagee for foreclosure is made before a Notary Public who is also an employee in the office of the attorney at law, employed by the mortgagee to foreclose the same. *Ibid.*
3. A mortgage upon a stock of goods then on hand, and upon the additional purchases as they should be made, is a good lien under our law to the amount of the goods on hand at the time, and is good upon future purchases, to that extent, even if those purchases be unpaid for, except as against any legal liens or title that may be against the goods in the hands of a third person. *Ibid.*

MUNICIPAL CORPORATIONS.

1. A town council having power to license and regulate the sale of spirituous liquors, may legally, in issuing a license, confine the sale of liquor to a particular room in a house. *Sanders & Son vs. T. C. of Elberton*..... 178
2. Whether two rooms in a particular house in which it is proposed to sell spirituous liquors, be in truth two distinct places, is a question of fact, and the judgment of the town council, under the evidence, holding that they are two distinct places, will not be disturbed if the evidence justify, though it may not require, such a conclusion by the Council. *Ibid.*
3. Bonds owned by citizens and residents of the city of Augusta on corporations, or individuals resident out of the city, are property within the city, so as to be subject to taxation by the city authorities under their general power to assess a tax upon property within the limits of the city. *City Council of Augusta vs. Dunbar*. 387
4. Under the laws of this State, a municipal corporation cannot levy a tax on the bonds issued by the State, even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State itself ought not to be presumed to have done in the absence of clear language so declaring. *Ibid.*
5. Unless express authority to do so be granted by the Legislature, a municipal corporation has no power to enforce the payment of taxes due it by affixing a penalty of an additional *per centum* for failing to pay promptly when due. *Ibid.*
6. In order to pass the title to land by a sale by the city marshal of Americus, under a *fi. fa.* for city taxes, it is necessary that all the requirements of the city charter should be fully met, and if there be a failure to advertise the sale for thirty days, as required by the charter, the sale is void. *Ansley et al. vs. Wilson, trustee*..... 418
7. A levy upon land in this State is made by an entry by the levying officer upon the *fi. fa.*, and an entry by a city marshal on a city tax *fi. fa.*, "Levied this *fi. fa.* on a house and lot of the defendant, situated in the

eastern part of the city of Americus, to satisfy the within," is not a sufficiently definite entry to give the marshal authority to sell a lot which the defendant happens to own in that part of the city; nor can such an entry by a city marshal be amended after the sale by adding a description sufficient to identify the property intended to be seized. *Ibid.*

8. A Court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case the nuisance being purely a public one, can only be restrained by the public on information filed by a public officer, to-wit: by the Solicitor General for the Circuit. *Coast Line Railroad Company vs. Cohen et al.*..... 451
9. Nor is it sufficient that one of the parties is a lot owner on the street, no specific injury to said property being alleged, but only a general allegation that damage will result to said lot. *Ibid.*
10. A railroad company was chartered with the privilege of running its road from such point within the limits of the city of Savannah as the Mayor and Council of the city should designate, and from thence to the sea coast, by certain cemeteries outside of the city, but used by the citizens for the burial of their dead. The Mayor and Council fixed the initial point considerably within the city, and passed an ordinance permitting the company to lay down its track from such initial point through certain streets and squares on the route from such point by said cemeteries in the direction prescribed by the charter, and to run horse cars thereupon:
Held, that such permission was within the authority of the Mayor and Council over the streets and squares of the city, and under its charter the company might, with such authority, so use the streets, not obstructing them permanently by excavations or embankments, and leaving them conveniently passable, except by the passage of the cars. Under such limitations no public nuisance will be created, and no grounds for an injunction by the public exist. *Ibid.*
11. A license is a right granted by some competent authority to do an act which, without such authority,

- would be illegal. *Home Ins. Co. vs. City C. of Augusta*..... 530
12. The tax called a "license tax," imposed by the City Council of Augusta, by the ordinance of January 5th, 1874, upon insurance companies doing business within the city, is a tax and not a license. *Ibid.*
13. The City Council of Augusta has power, under the charter of the city, to tax occupations, businesses, etc., and a foreign corporation which has an agency and a regular agent for the purpose of transacting its usual business within the city, is liable to be taxed. *Ibid.*
14. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property so as to be subject to the *ad valorem* and uniformity rules of taxation, prescribed by the Constitution, and therefore a tax on fire insurance companies different from what is imposed on life insurance companies, does not make the tax obnoxious to any constitutional requirement. *Ibid.*

NEGOTIABLE INSTRUMENTS.

See *Bonds*.

" *Promissory Notes*.

NEW TRIAL.

1. The verdict of the jury in this case, turning as it did upon whether the jury believed the version of one or the other party at the time of the tenders on the 21st, is supported by the evidence, and, although the proof appears somewhat stronger for the defendants than the plaintiff, yet, as the jury has given the most weight to the plaintiff's evidence, and the Judge has refused to interfere, this Court will not do so. *Cunningham vs. Clark & Co*..... 39
2. We see no abuse of the discretion of the Court in granting the new trial, and the judgment is accordingly affirmed. *Steadman vs. Lee*..... 45
- Wadsworth, Williams & Co. vs. Duke*..... 91
- Johnson vs. Sims*..... 119
- Killen vs. The State*..... 223
- Stansell vs. Lindsay et al.*..... 360
- Reid vs. The State*..... 556
- Nussbaum & Dannenburg vs. Ross, adm'r*..... 628

3. Where the verdict of a jury does substantial justice between the parties, and no error of law has been committed, the discretion of the Superior Court refusing a new trial will not be interfered with. *Burnett et al. vs. Ross, administrator* 124
4. The evidence for the plaintiff in this case is deficient in that it fails to show that the mule was afflicted with the disease of which it died at the time of the warranty, and it was no abuse of the discretion of the Judge to refuse to grant a new trial. *McCoy vs. Wiley*..... 126
5. An immaterial error is no ground of new trial. *Allen, adm'r, vs. Woodson, ex'x, et al.*..... 53
Wimberly, trustee, vs. Collier..... 144
6. This Court will not reverse the judgment of the Judge of the Superior Court refusing a new trial in a criminal case when there have been two verdicts of guilty, and the case turns wholly on the credibility of the witnesses. *Crawford vs. The State*..... 249
7. When a motion was made in the Superior Court for a new trial, which was refused by the Court and a bill of exceptions to his judgment was tendered, signed, served and filed in the clerk's office, and after this, during the same term, a motion was made to rehear and set aside the judgment refusing the new trial on the ground that the movant had discovered new and important evidence which ought to control the verdict, and the Judge failed to pass upon this latter motion *pro* or *con*, but by an order directed the clerk to send it with the other papers to this Court with the bill of exceptions:
Held, that as the Judge has not passed upon this latter motion, it is still pending in the Superior Court, and cannot be considered here until it be passed upon by the Court below. *Ibid.*
8. Though the Court may make an unauthorized remark in reference to a question asked a witness, yet, if the testimony in connection therewith be on a matter which, under the whole evidence, could not have availed the party complaining, it is not such an error as will call for a new trial. *Tutt vs. Land*..... 339
9. We think in this case that the true issue between the parties has not been fairly passed upon, and that a new trial should be had, so that, after proper amend-

- ments, the whole matter may be fully inquired into, and the rights of the parties settled. *Rose vs. West.* 474
10. There being no evidence to support the verdict, a new trial will be ordered. *Earp vs. The State*..... 513
11. Under the forty-ninth rule of the Superior Court, which the Judges were expressly authorized to establish by section 3712 of the Code, it is necessary for the movant in a motion for a new trial, to file a brief of the testimony in the cause under the revision and approval of the Court, and it is error for the presiding Judge, where a brief of the testimony has neither been filed or made out, to set aside a verdict on the ground that it is without evidence to support it, and contrary to the charge of the Court. *Peacock, Chapman & Co. vs. Peacock*..... 595
12. It would require a very strong case to authorize this Court to grant a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to its judgment in overruling a second motion for a new trial, after the case had been heard before this Court and a new trial refused. *Kelly vs. Hall, Judge.* 636
13. As the jury did find, on the facts of the case, in favor of the plaintiffs so far as to give them nominal damages, and as we are of opinion that they were probably misled by the charge of the Court on this point, and by the further charge limiting the right of recovery "to the amount of damages actually sustained by the plaintiffs themselves," when it appeared in evidence that the damages recoverable would enure to the benefit of plaintiffs' consignors, we think that a new trial should be granted. *Groover, Stubbs & Company vs. Warfield & Wayne*..... 644

NON-SUIT.

- Under the facts of this case, as they appear in the record, including the two rejected letters, which we think should have been admitted, we are of the opinion that the plaintiff was entitled to go to the jury on the proof, and that the non-suit was error. *Augusta Amateur Musical Club vs. Cotton States' Mechanics' and Agricultural Fair Association*..... 436

NUISANCE.

1. A private nuisance may be abated in this State under the provisions of section 4023, etc., of the Revised Code, provided the application is made by the party injured. *Ruff vs. Phillips et al.*..... 130
2. To make a business a nuisance it must be such to people of ordinary nature or condition; it is not sufficient if it be simply offensive to delicate and sensitive organizations. *Ibid.*
3. An order abating a nuisance ought not to exceed the necessity of the case, and if it do this it should be set aside. *Ibid.*
4. Justices of the Peace have not jurisdiction, under the provisions of the 4023d section of the Code, to abate as a nuisance a bridge constructed by a railroad company over a navigable stream. *Macon and Brunswick Railroad Company vs. The State, ex rel.*..... 156
5. A Court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case the nuisance being purely a public one, can only be restrained by the public, on information filed by a public officer, to-wit: by the Solicitor General for the Circuit. *The Coast Line R. R. Co. vs. Cohen et al.*..... 451
6. Nor is it sufficient that one of the parties is a lot owner on the street, no specific injury to said property being alleged, but only a general allegation that damage will result to said lot. *Ibid.*
7. A railroad company was chartered with the privilege of running its road from such point within the limits of the city of Savannah as the Mayor and Council of the city should designate, and from thence to the sea coast by certain cemeteries outside of the city, but used by the citizens for the burial of their dead. The Mayor and Council fixed the initial point considerably within the city, and passed an ordinance permitting the company to lay down its track from such initial point through certain streets and squares on the route from such point by said cemeteries in the direction prescribed by the charter, and to run horse cars thereupon:

Held, that such permission was within the authority of the Mayor and Council over the streets and squares of the city, and under its charter the company might, with such authority, so use the streets, not obstructing them permanently by excavations or embankments, and leaving them conveniently passable, except by the passage of the cars. Under such limitations no public nuisance will be created, and no grounds for an injunction by the public exist. *Ibid.*

ORDINARY. See *Guardian and Ward*, 1-3.

PARENT AND CHILD. See *Contracts*, 4.

PARTIES.

1. Where a bill of exceptions is filed to proceedings had upon the trial of a claim case, the defendants in *fi. fa.* are not necessary parties. *Graves vs. Tifts*..... 122
2. Where a bill was filed to marshal the assets of an insolvent estate, and among the debts due by the deceased was one due as guardian of his two daughters, both of whom were married at the death of the father, and the husband of one of the daughters was a party to the original bill charged with wasting the assets to a large amount, and pending these proceedings the two daughters, by their next friend, came in and were made parties by petition, setting up the debt due them by their father and praying that it should be settled to their sole use, and before any final decree, one of the daughters died leaving minor children :
Held, that the right to a settlement was sufficiently asserted by the mother during her lifetime, to authorize the children to come in by petition and assert the right for their own benefit as survivors. *Polhill, guardian, vs. Neal et al*..... 146
3. The creditor's debt was contracted in 1859, and the bill was filed in 1869, originally against the administrator, the purchaser and his vendor, and the widow of the intestate who had taken dower, charging notice of the lien on each, and praying a sale of the land for the discharge of the vendor's lien. By amendments made after January 1st, 1870, all parties defendants were stricken from the bill except the administrator and the first purchaser, who, it was charged, had not

paid for the land. The prayer was also amended, asking judgment on the debt against the administrator, and that the purchaser be decreed to pay his debt due the estate to complainant, and praying an injunction restraining the collection of the debt due by the purchaser :

Held, that no necessity was shown why the purchaser should be a party, or for the relief prayed against him, or for any injunction, and the bill should have been dismissed as to the purchaser. *Atkinson vs. Keith, adm'r, et al.*..... 577

PARTITION. See *Equity*, 6.

PARTNERSHIP.

1. When a portion of the assets of an estate consists of an interest in a partnership of which the deceased was a member, it is the duty of an executor who knows the fact, to take notice of the claim in his inventory and return it to the Ordinary, but a failure to do this, though an act justifying suspicion, does not require the executor to be charged with the nominal value of such interest, and he may show what was its real value. *Moses et al. vs. Moses, ex'r.*..... 9
2. When, within a reasonable time after qualification, the executor has a settlement with a surviving partner of the deceased, and receives from him, as the deceased's interest, part of the assets of the partnership in kind, such settlement is to be considered *prima facie* as a fair one, and if there be no affirmative evidence to the contrary, a jury is authorized to act upon it as a just and proper settlement. *Ibid.*
3. When an executor buys from a surviving partner of the deceased an interest in the partnership giving his own note, and subsequently takes from the surviving partner that note as part of the deceased's share in the partnership, and substitutes in his hands, as executor, for that note, other good and well secured notes belonging to himself as an investment of the money for the estate. Such acts are not illegal though they justify and require a close scrutiny into the good faith and *bona fides* of the transaction. *Ibid.*
4. On the trial of a bill by a surviving partner against the representatives of a deceased partner for an account

- and settlement of the partnership affairs, the survivor is not a competent witness to testify in his own favor; nor does it alter the case that a portion of the matter in dispute is a Confederate transaction and involves the value of Confederate money, except that the survivor may testify as to the value of said money. *Graham et al. vs. Howell et al., executors*..... 203
5. When a contract of partnership provides that one partner shall furnish the stock of goods (drugs) then on hand, and the other shall give his skill, services, etc., and the first shall have three-fourths of the net profits, the other the remaining fourth, the partner so furnishing the capital is not entitled in the division of the profits to interest on the capital stock. *Tutt vs. Land* 339
6. One item of the contract was, "if the wants and necessities of said business demand an increase of capital, and the same be supplied by the said, (the partner who furnished the original stock,) the firm stipulate to pay him interest therefor at the rates," etc.:
- Held*, that the simple fact that said partner did not withdraw the whole of his share of the profits for the first year, without any agreement or notice to the other partner that the capital was to be increased to that amount, did not give such partner the right of interest on such excess. *Ibid*.
7. Nor was such partner entitled to claim for the ordinary natural depreciation of the goods and fixtures of the store, both constituting the capital stock. *Ibid*.
8. When one partner seeks, by way of recoupment, to have a deduction made from the amount of the claim of the other in the profits, on account of fraud or neglect or acts of disloyalty to the partnership, whereby the interest of the firm suffered damage, such deduction cannot go beyond the amount of damage proven. *Ibid*.
9. The legal construction of the agreement made between the plaintiffs in error and the defendant, which was by its terms to be made an award, and was so made by the arbitrators and also entered on the minutes of the Court and made the decree thereof without exception, is that defendant was to receive from plaintiffs the amount therein specified by January 1st, 1871, for

her interest in the partnership property, and that defendant was to deposit \$2,400 00 of said amount as an indemnity against her proportion of the liability for outstanding debts, under the terms set out in the agreement, and to protect the interest conveyed to Theodore Ewing against the same. *Gatchius et al. vs. Hodges, administratrix* 603

10. If there was ambiguity as to the meaning of the agreement, etc., the verdict of the jury rendered on the application to have a more full decree entered and for an execution to enforce the same, and the issue made thereon, determined the questions involved, and authorized the order of the Court that was granted. *Ibid.*

PLEADINGS. See *Corporations*.

POSSESSORY WARRANT.

Where possession of a horse was obtained by a fraudulent trick, a possessory warrant is the proper remedy to recover the same; and that the consent of the plaintiff in the warrant was obtained to such possession, under the circumstances of this case, will not justify the retention of the possession by the defendants. *Peak et al. vs. Cogborn*..... 562

PRACTICE IN THE SUPERIOR COURT.

1. Where a levy under an illegal distress warrant is dismissed the Court has no authority to retain the case until a new warrant can be issued. *Graves vs. Tifts.* 122
2. Where the Court, at a regular term, appoints an auditor in a case involving matters of account, with the powers as provided in section 4202 of the Code, and no exceptions thereon are certified, filed, etc., during the term, as by law prescribed, it is too late when the auditor proceeds to act in vacation to object to his appointment, or to the powers conferred on him, or to make such objections the ground of exception to his report. *Tutt vs. Land*..... 339

PRACTICE IN THE SUPREME COURT.

1. An acknowledgment of service and waiver of further service by counsel for defendant in error on the bill

- of exceptions, dated anterior to the certificate of the Judge, is not a valid service. *Tison vs. Forrester*..... 87
2. Where service of the bill of exceptions is made by the attorney for the plaintiff in error, it must be authenticated by his affidavit made at the time of the service and attached to the bill of exceptions. *Burney vs. Collins*..... 90
3. Where a bill of exceptions is filed to proceedings had upon the trial of a claim case, the defendants in *fi. fa.* are not necessary parties. *Graves vs. Tifts*..... 122
4. This Court can only pass upon judgments rendered by the Court below. *Chambers vs. The State. Murphy vs. The State*..... 150
5. Where a bill of exceptions was certified on January 24th, 1873, and service perfected on February 17th, 1873, the writ of error will be dismissed. *Phillips vs. McNeice, adm'r*..... 358
6. A party being prejudiced in his rights by the action of the Judge after the presentation to him of the bill of exceptions for his signature, under circumstances which may be remedied by the writ of *mandamus*, must make his application for said writ on or before the third day of the term of this Court next after the bill of exceptions is tendered, or he will not be heard. Rule 29. *Ibid.*
7. An acknowledgment of "due and legal service" of the bill of exceptions, and a waiver of "all further notice and service," given after the expiration of the time within which service could have been legally perfected, will not prevent the dismissal of the writ of error. *Ibid.*
8. Where service of the bill of exceptions is made by a party or his attorney, such service must be authenticated by the affidavit of the person perfecting the same, on the original bill of exceptions, or attached thereto. *Cloud vs. The State*..... 369
9. Where service of the bill of exceptions is made by a sheriff or a constable, the entry thereof by such officer on the original is sufficient evidence of the fact. *Ibid.*
10. Service of the bill of exceptions by leaving a copy thereof at the office of counsel for defendant in error, is insufficient. *Ibid.*

11. Service of the bill of exceptions by an attorney must be verified by the affidavit of such attorney at the time the service is made. *Lathrop & Co. vs. Kemp, sheriff.* 483
12. Such defective service cannot be cured by the affidavit of the attorney made in this Court. *Ibid.*
13. Where the judgment of this Court has been reversed upon writ of error to the Supreme Court of the United States, the judgment of said tribunal will, on motion, be made the judgment of this Court. *Walker vs. Whitehead*..... 484
14. Where upon a motion for a new trial, it was agreed that the documentary evidence introduced should be used on said motion, and it appears that said evidence was in the clerk's office, and a copy thereof was not transmitted to this Court as a part of the record, the case will be continued upon a suggestion of the diminution of the record. *Brown vs. Patterson*..... 485
15. The suggestion of a diminution of the record must be made under oath, in writing, on or before the calling of the case as prescribed by Rule 9 of this Court. This rule will be strictly enforced. *Ibid.*
16. Where the acknowledgment of service on the bill of exceptions ante-dates the certificate of the Judge thereto, the writ of error will be dismissed. *Shealy vs. McLung & Dykes*..... 485
17. The acknowledgment of service upon the bill of exceptions cannot be shown to bear a wrong date by *aliunde* proof. *Ibid.*
18. An acknowledgment "of due and legal service," and a waiver "of copy and all other and further service," does not cure a defective service which arises from the fact of an attempted service before the certificate of the Judge was attached to the bill of exceptions. *Ibid.*
19. Where an instrument is produced, signed by the plaintiff in error, stating that the case was carried to this Court without authority from him, and consenting to its dismissal, his counsel will not be permitted to proceed with said litigation for the recovery of their fees, except upon showing that the case had been settled by the defendants in error with notice of the contract under which they were to be compensated. *Green vs. Stringfellow et al.*..... 486

20. Knowledge that the movants were of counsel, and that their client was insolvent, is not such notice. *Ibid.*
21. The date of the entry by the clerk of the Superior Court of the filing in office of the bill of exceptions, cannot be shown to be erroneous by extraneous testimony. *Walker vs. Smith*..... 487
22. If the date of the filing of the bill of exceptions in the clerk's office of the Superior Court is incorrect, the proper remedy is by writ of *mandamus* to be applied for to the Judge of the Superior Court. *Ibid.*
23. Where evidence was admitted in the Court below without objection, exception thereto will not be heard in this Court. *Miller et al. vs. Defoor*..... 566
24. It would require a very strong case to authorize this Court to grant a *mandamus* to compel the Judge of the Superior Court to sign and certify a bill of exceptions to its judgment in overruling a second motion for a new trial, after the case had been heard before this Court and a new trial refused. *Kelly vs. Hall, Judge.* 636

PRESCRIPTION.

1. The fact that the prescriptive title sought to be established is based upon a quit-claim deed as color of title, does not of itself negative the presumption of good faith. *McCamy, adm'r, vs. Higdon et al.*..... 629
2. Where the evidence disclosed that the defendants' vendor was a mere squatter and had no title to the land in controversy; that the defendants had knowledge of this fact before and at the time of the execution of the deed to them, and before and at the time of the commencement of their possession of the land under it, then no prescription could have been based thereon. *Ibid.*

PRINCIPAL AND AGENT.

1. The plaintiffs were the agents of a manufacturer of guano, and as such, by their local agent, sold to the defendant a lot of guano, and warranted the same to be a good fertilizer, taking a note for the price, payable to themselves. Afterwards, before the note became due, they became the real owners of the note by arrangement between themselves and the manufacturers:

- Held*, that the plaintiffs were not such *bona fide* purchasers without notice, of defendant's note, as that defendant could not set up as a plea that the guano was of no value, even though it be not proven that plaintiffs knew it to be of no value at the time they became the real owners of the note. *Boit & McKenzie vs. Whitehead et al.*..... 76
2. Whilst, as a general rule, the principal alone can sue on a contract made by an agent for the benefit of the principal, yet, if the agent himself have an interest in the contract, he may sue upon it in his own name. *Field, adm'r, vs. Price*..... 135
2. Where the defendant was sued on an account for money placed in his hands as the agent of the plaintiffs, and he pleaded that the plaintiffs had failed to give him credit for \$25,000 00 which had been repaid, it was competent for him to show that he had only discovered this omission upon the trial, and as a reason why it was not discovered earlier, to prove that large sums of money belonging to persons other than the plaintiffs, at the time he was their agent, passed through his hands, all of which money he kept together with that of the plaintiffs, being responsible for the amount charged against him by each firm, and that though a large discrepancy in his general money balance was observed, yet, as said sum was repaid by another, the error was not discovered until it appeared from the evidence. *Glenn et al. vs. Salter* 170
4. Where the evidence was conflicting as to what commissions the defendant was to receive as the agent of the plaintiffs in purchasing cotton, it was competent to show the compensation allowed by other parties to their agents engaged in the same business. *Ibid.*

PROCESS.

Where a declaration was filed and process attached against a corporation, and a regular return made by the sheriff that the defendant was not to be found, and that the president of the corporation was dead, the plaintiff is not entitled after the lapse of five terms of the Court without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing

term, and to perfect service by publication under section 3370 of the Code. *Branch vs. Mechanics' Bank*..... 413

PROMISSORY NOTES.

1. Where two promissory notes, before due, were delivered to and accepted by an incorporated body invested with banking privileges as collateral security for a loan of money made by said corporation to the payees of said notes at a greater rate of interest than seven per cent., the title to the same does not pass, and the maker thereof may plead in bar to a suit thereon in favor of said bank, payment made to the original payees without notice of said assignment. *Caswell vs. Central Railroad and Banking Company*..... 70
2. The plaintiffs were the agents of a manufacturer of guano, and as such, by their local agent, sold to the defendant a lot of guano, and warranted the same to be a good fertilizer, taking a note for the price, payable to themselves. Afterwards, before the note became due, they became the real owners of the note by arrangement between themselves and the manufacturers:
Held, that the plaintiffs were not such *bona fide* purchasers without notice of defendant's note, as that defendant could not set up as a plea that the guano was of no value, even though it be not proven that plaintiff knew it to be of no value at the time they became the real owners of the note. *Boit & McKenzie vs. Whitehead et al*..... 76
3. A *bona fide* purchaser without notice of a promissory note and mortgage to secure it, who buys before the debt becomes due, is protected against a defense that the mortgage was made by the debtor in anticipation of bankruptcy and to defraud his creditors. *Murray & Company et al. vs. Jones et al*..... 109
4. When a promissory note is made in South Carolina, payable on its face at Charleston, to a citizen of South Carolina, it is a South Carolina contract, notwithstanding the maker lives in Georgia, and notwithstanding at the time of the making of the note the maker also executes a mortgage to secure it on goods situated in Georgia, the residence of the mortgagor. *Goodrich et al. vs. Williams*..... 425

5. A tenant occupied a store-room from September, 1870, to December, 1871. In September, 1870, it was agreed between him and the landlord that he, the tenant, should have the store repaired, and the cost thereof should be deducted from the rent, and the repairs were then made. In December, 1870, he gave the landlord his note, expressing therein that it was for the rent of the store-room he then occupied, to be paid quarterly. The Court was requested by defendant to charge the jury that the agreement as to the repairs rebutted the presumption of law that the giving of a note was evidence that there had been a settlement of accounts: *Held*, that the refusal of the Court so to charge was not error. *Broughton vs. Thornton, adm'r.*..... 568

RAILROADS.

1. An action against a railroad company to recover the excess of a payment for freight beyond what is allowed to be charged by the charter of the company, may be brought under the Act of March 4, 1869, in the county from which the articles were shipped, that being the place where the contract for shipment was made, although the payment was made in another county. *Arnold & DuBose vs. Ga. R. R. and Banking Co.*.... 304
2. The Georgia Railroad and Banking Company, under the 12th section of its charter, can only charge for freight fifty cents per one hundred pounds on heavy articles for one hundred miles, and in proportion to that rate for a less distance than one hundred miles. *Ibid.*
3. If payment beyond the rate specified in the charter be made voluntarily by the shipper, through mere ignorance of the law, or paid "where the facts are all known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party," an action will not lie to recover it back. *Ibid.*
4. Where a railroad train was stopped at a station, but somewhat away from its usual place of stopping at that station, and where there was not good ground for getting off, and a passenger, thinking the train would be moved up to the usual place, failed to get off as he had intended, and after the train had left the station

and was fairly on its way to its next stopping place, the passenger himself seized the bell-rope, rang the engine bell, and took his position on the lower step of the platform to get off, and the engineer having answered the bell, as the cars were coming to a stop, but before they were stopped, the passenger, deeming the motion slow enough for safety, undertook to step off, but just as he was stepping, he was, by a sudden jerk of the cars, thrown down and his arm crushed by one of the wheels of the car passing over it:

Held, that the conduct of the passenger in himself ringing the bell, taking his position on the step, and undertaking to step off whilst the cars were still in motion, was a want of ordinary care and showed gross negligence on the part of such passenger. *Blodgett, sup't, vs. Bartlett*..... 353

5. It was error in the Court, under the facts, to charge the jury, in effect, that the road would be liable if at the time of his attempting to step off, the cars were moving so slowly as that he thought it was safe then to step off. *Ibid.*

6. When an employee of a railroad company, by special written contract, at the time he was employed, and in consideration thereof, agreed "to take upon himself all risks connected with or incident to his position on the road, and that he would in no case hold the company liable for any damage he might sustain by accidents or collisions on the trains or road, or which may result from the negligence, or carelessness, or misconduct of himself or other employee or person connected with such road, or in the service of the company:"

Held, that such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract and binding upon the employee. *Western and Atlantic R. R. Co. vs. Bishop*.. 465

6. It is the duty of a railroad company to furnish to its employees reasonably safe material and tools for their use in its service; but an employee who is aware of the dangerous character of any particular tool or instrument and uses it, cannot, if he is damaged, have redress by an action, especially if he had agreed to take upon himself the risk of his business. *Ibid.*

7. It was error in this case to charge the jury that if the tool or instrument by means of which the plaintiff was injured, was extraordinarily unsafe, he could recover, unless he knew of its dangerous character at the time he made the special contract. There was, in the first place, no proof to justify the assumption that the instrument was an extraordinarily dangerous one for the purpose, nor was it necessary, in order to bring the employee within the terms of his special contract, that his knowledge of the nature of the instrument should have been obtained at or before the making of the contract; it is sufficient if, at the time the instrument was used, the employee knew its nature and its dangerous character, if it was dangerous. *Ibid.*
8. An employee of a railroad, a part of whose business was to couple cars, who was ten months in the employment of the road in that business, and who, by special contract, had taken upon himself the risks incident to his station, cannot, if he be injured, escape the effect of his contract by showing that a particular kind of link or coupler, regularly in use on the train to which he was attached, and used by him for ten months, was a less safe instrument for the purpose than other kinds of links or couplers. To make out a case of liability on the company under such a contract, it should appear that there was such gross neglect to furnish proper tools as showed recklessness of human safety on the part of the company or its principal officers, and a want of knowledge on the part of the employee of the character of the instrument furnished at the time he was called on to use it. *Ibid.*

See *Common Carriers*, 1, 2.

RECEIPT.

When a receipt acknowledged a certain sum in full of certain described promissory notes, and in full of all demands, the general words, though they do not enlarge the particular words as to what transpired at the time, yet they do import and may be used to prove that the party giving the receipt had, at the time, no other demands against him to whom the receipt was given. *Allen, administrator, vs. Woodson, executrix, et al.....* 53

RECORDS. See *Registry*.

REGISTRY.

1. Whilst it is the duty of the clerk of the Superior Court to keep a proper index of his books of record, so that one searching the records may easily find what is or is not contained therein, yet a deed or mortgage which is in fact recorded, does not cease to be notice and to be properly recorded, simply because the index to the record book fails to show where it may be found. *Chatham vs. Bradford, sheriff*..... 327
2. When a record is shown to be lost or destroyed, its contents may be proven by parol without establishing the lost or destroyed original. *Bridges et al. vs. Thomas, adm'r* 378
3. The original papers, to-wit: the declaration, process, verdict and judgment in a suit, do not cease to be records because they have not been recorded in the record book of writs in the Superior Court. *Ibid.*

RELIEF ACT OF 1868.

1. On the trial of a motion made under the Relief Act of 1868, to open a judgment rendered in 1867, upon a note dated February 13th, 1861, and due at twelve months, it is not competent for the defendant to prove that in April, 1861, he tendered bank bills in payment of the debt, and that the creditor, or his agent, then refused to accept the bills, or any payment of the note. *Fannin, adm'r, vs. Thomason*..... 614
2. Where such a motion is filed on the further ground that the creditor had agreed during the war to receive in payment of the debt seven-thirty (7-30) Confederate treasury notes and Georgia bonds, and that movant, by sale of cotton, had procured such notes and bonds, and tendered them, which were refused, and it appeared that the movant had kept them until the trial, but collected the interest which accrued on the bonds and notes for his own use :
Held, that the collection of the interest by the movant was an appropriation of the bonds and notes for his benefit, and he cannot claim that under said statement of facts the debt is discharged and satisfied. *Ibid.*

RELIEF ACT OF 1870.

In accordance with the opinion of a majority of this Court in the cases known as the "tax cases," at the last term of this Court, the judgment of the Court below is reversed on the ground that the Act of October 13th, 1870, is in violation of Article I., section 10, paragraph 1, of the Constitution of the United States. *Dougherty vs. Fogle. Dougherty vs. Chipley. Dougherty vs. Smith*..... 464

REMOVAL OF CASES.

When judgment in attachment was rendered against the defendant, but pending the motion to enter judgment against the garnishee, the cause was, on motion of plaintiff's attorney, ordered to be removed to the Circuit Court of the United States, and subsequently the plaintiff sued out a process of garnishment at common law upon said judgment, to which an answer was filed which was traversed, and upon the trial of the issue thus formed a motion was made to dismiss the second garnishment proceedings on the ground that the judgment against the defendant had been carried to the Circuit Court of the United States, and therefore garnishment process could not issue from it and because there had already been one process of garnishment issued to recover the same debt, whereupon plaintiff's attorney submitted his affidavit to the effect that the Circuit Court had refused to take jurisdiction of said case because the record was not filed on the first day of the Court:

Held, that the motion was properly overruled. *Eagle & Phoenix Man. Co. vs. White, Sheffield & Company*..... 82

RETAIL LICENSE.

See *Municipal Corporations*, 1, 2.

SALES.

1. Where one was under a contract to accept and buy a lot of corn from the plaintiff between the 10th and 20th of April, and on the last day he agreed to extend the time for a tender until the 21st, and on the 21st the plaintiff tendered a lot in the morning, which was

not accepted, and again in the evening, which the defendant refused to look at:

- Held*, that it was not error in the Court to admit the evidence of a tender at any time during the day on the 21st, and that it was not error to refuse to permit defendant to show that plaintiff had made several tenders, between the 10th and 20th of April, of bad corn, and thus to justify defendant in refusing to look at the second tender on the 21st. *Cunningham vs. Clark & Company*..... 39
2. When a tract of land is sold in a body as containing so many acres "more or less," and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned. *Walton vs. Ramsey*..... 618
3. A sale and delivery of cotton for cash to the amount of \$50 00 or more, with a "sale ticket" or memorandum in writing, signed by the seller, is a contract binding on the buyer under section 1950, Code, and the vendor can recover damages from the purchaser for the breach thereof in returning the cotton and refusing to pay for the same, notwithstanding, under section 1593, the cotton, by reason of the non-payment, did not become the property of the buyer, nor the ownership thereof given up. *Groover, Stubbs & Co. vs. Warfield & Wayne*..... 644
4. Under said section 1950, a sale of cotton to the amount of \$50 00 or more, without any memorandum signed by the buyer or by some person by him lawfully authorized, or an acceptance and actual receipt of the cotton, or part thereof by him, and where nothing is given in earnest to bind the bargain, or in part payment, is not binding on the buyer. *Ibid.*
5. Cotton factors can, in their own names, recover all the damages resulting from a breach of contract by the buyer of cotton from them, although they may be bound to pay the same, when recovered, to their consignors. *Ibid.*
6. The measure of damage in such a case is the difference between the contract price for the cotton and the value thereof on the day of the breach. *Ibid.*

See *Administrators and Executors*, 8, 9, 10, 14.

" *Levy and Sale*.

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SCIRE FACIAS.

When on the trial of an affidavit of illegality to an execution, the Judge held the judgment to be dormant for want of an entry within seven years, and the next day the plaintiff sued out a *scire facias* to revive, and subsequently to this suing out of a *scire facias*, he filed a bill of exceptions to the judgment of the Judge, but afterwards withdrew it:

Held, that the pendency of the bill of exceptions could not be pleaded in abatement to the *scire facias*. *Bridges et al. vs. Thomas, adm'r*..... 378

SENTENCE. See *Criminal Law*, 18.

SERVICE.

1. An acknowledgment of service and waiver of further service by counsel for defendant in error, on the bill of exceptions, dated anterior to the certificate of the Judge, is not a valid service. *Tison vs. Forrester*..... 87
2. Where service of the bill of exceptions is made by the attorney for the plaintiff in error, it must be authenticated by his affidavit made at the time of the service, and attached to the bill of exceptions. *Burney vs. Collins* 90
3. When a suit was brought against Robert Campbell, as a stockholder in a corporation, on his statutory liability for a debt due by the corporation, and the process was returned served by the sheriff thus: "Served the within by leaving a copy at the residence of Robert Campbell," and the defendant not appearing, a verdict and judgment was taken against Robert Campbell, and an execution for the same being levied on the property of Robert Campbell, he filed his bill in equity alleging that he never had been a stockholder in said company, but that there was another Robert Campbell of the county who was such stockholder, and alleging further that he had no notice of said suit, and that if a copy was left at his residence he did not get it or have any knowledge of it, and praying that the judgment should be enjoined against him. On the trial it was proven by the sheriff that he had left the writ at the residence of the present complainant, and this was all the proof *pro* or *con* on the subject of service, but the complain-

ant showed by Mr. Sibley that he had not been a stockholder in said company, but that the other Robert Campbell was a stockholder:

Held, that it was error in the Judge to charge the jury that the judgment did not conclude the complainant, unless he was personally served with the process. *Frazer vs. Sibley et al., executors*..... 96

4. As there was no affirmative evidence on the trial to show which Robert Campbell the plaintiff had intended to sue, and the complainant having been duly served with process in that suit according to law, it was his duty to appear and defend the same, and having failed so to do he is concluded by the judgment, it being the legal presumption that it was made to appear on that trial that the defendant then served was a stockholder, as charged in the declaration, and the jury should in this case have found against the complainant unless it had been made to appear that the verdict in the other suit was obtained by perjury or by taking a verdict without proof (as in case of a judgment by default) of anything but the original judgment. *Ibid.*
5. Where a bill of exceptions was certified on January 24th, 1873, and service perfected on February 17th, 1873, the writ of error will be dismissed. *Phillips vs. McNeice, administrator*..... 358
6. An acknowledgment of "due and legal service" of the bill of exceptions, and a waiver of "all further notice and service," given after the expiration of the time within which service could have been legally perfected, will not prevent the dismissal of the writ of error. *Ibid.*
7. Where service of the bill of exceptions is made by a party or his attorney, such service must be authenticated by the affidavit of the party perfecting the same, on the original bill of exceptions, or attached thereto. *Cloud vs. The State*..... 369
8. Where service of the bill of exceptions is made by a sheriff or a constable, the entry thereof by such officer on the original is sufficient evidence of the fact. *Ibid.*
9. Service of the bill of exceptions by leaving a copy thereof at the office of counsel for defendant in error, is insufficient. *Ibid.*
10. Where a declaration was filed and process attached against a corporation, and a regular return made by

- the sheriff that the defendant was not to be found, and that the president of the corporation was dead, the plaintiff is not entitled after the lapse of five terms of the Court without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term, and to perfect service by publication under section 3370 of the Code. *Branch vs. Mechanics' Bank*..... 413
11. Service of the bill of exceptions by an attorney must be verified by the affidavit of such attorney at the time the service is made. *Lathrop & Co. vs. Kemp, sheriff*. 483
 12. Such defective service cannot be cured by the affidavit of the attorney made in this Court. *Ibid*.
 13. Where the acknowledgment of service on the bill of exceptions ante-dates the certificate of the Judge there-to, the writ of error will be dismissed. *Shealy vs. Mc-Lung & Dykes*..... 485
 14. The acknowledgment of service upon the bill of exceptions cannot be shown to bear a wrong date by *aliunde* proof. *Ibid*.
 15. An acknowledgment "of due and legal service" and a waiver "of copy and all other and further service," does not cure a defective service, which arises from the fact of an attempted service before the certificate of the Judge was attached to the bill of exceptions. *Ibid*.

SETTLEMENT. See *Promissory Notes*, 5.

SHERIFF.

1. A sheriff having collected money for a plaintiff in execution is subject to process of garnishment at the instance of a creditor of said plaintiff. *Gray, sheriff, vs. Maxwell, trustee*..... 108
2. Where a balance of money collected on an execution remained in the sheriff's hands, which he was notified was claimed by the attorney for the plaintiff in *fi. fa.* as his fee, and after such notice judgment was rendered against him on a process of garnishment sued out at the instance of a creditor of said plaintiff, he making no defense, which judgment he satisfied, it was not error in the Court, on the hearing of a rule *nisi* requiring him to show cause why he should not pay over

- such balance to the plaintiff's attorney, to make the rule absolute. *Ibid.*
3. If there be no newspaper published in the county in which land is levied on for sale, it becomes the duty of the sheriff to publish notice thereof in the nearest newspaper having the largest or a general circulation in such county. In the latter case, notice need not be published at any place in said county. *Lamb, adm'r, vs. Allen, ex'x...* 207
 4. Where there is a levy upon land entered by the sheriff upon an execution, but by mistake the entry is not signed by the sheriff, the failure to sign is not fatal to the levy. The sheriff may amend it by adding his signature. *Sharp vs. Kennedy*..... 208
 5. When there was a rule absolute taken against a sheriff in 1860 for failing to raise certain money under a *fi. fa.*, and in 1867 an attachment was moved for against the sheriff, and he showed for cause against the attachment that he was not and never had been in contempt of the process of the Court; that though the original *fi. fa.* had been in his hands, the failure to raise the money on it was in consequence of written orders of the plaintiff not to proceed with it; that the rule absolute was taken by consent and at the request of the plaintiff, with intent thus to induce the defendant's agent and representative to pay it, and with the express agreement that it was not to be used against the sheriff:
Held, that the foundation of a rule absolute is the contempt of the Court in the failure of the sheriff to obey its order. And the rule will not be enforced by attachment but will be set aside, if it be made to appear that the officer is not really liable, and the judgment on the rule is for this purpose always open, under the discretion of the Court, to a rehearing. *Holcombe vs. Dupree* 335
 6. In this case if the answer of the sheriff be true, (and the demurrer admits the truth,) the rule absolute ought not to have been granted, as the sheriff was not in contempt, and it was error in the Court to grant the attachment under the admitted facts set forth in the record. *Ibid.*

7. Where upon a rule against the former and present sheriffs requiring them to show cause why one or the other should not pay over the money due on a certain execution, the former answered that he turned over the *fi. fa.* to his successor in time to have made the money before Court, and the present sheriff set up that he was enjoined from proceeding thereon, it was not error in the Court, in the absence of a traverse of the answers, to discharge the rule. *Cason vs. Mulling*..... 598

SLANDER.

1. In a declaration claiming damages for words calculated to injure the plaintiff's reputation as an attorney at law, it is not sufficient to allege that the defendant was an attorney, it must be stated and proven that the words were used "in reference to his profession." *Van Epps vs. Jones*..... 238
2. Where in an action on the case for words, the ground of the action is "special damages flowing to the plaintiff from the use of the words," it is not sufficient to set forth as damages money paid voluntarily by the plaintiff, such as the charge of a notary for protesting a paper, which, under the law, was not a protestable paper or which had not been legally protested. *Ibid.*

SPECIFIC PERFORMANCE.

See *Equity*, 9, 15.

STATE. See *Criminal Law*, 14, 15, 17.

STATUTE OF FRAUDS. See *Sales*, 3, 4.

STATUTE OF LIMITATIONS.

See *Limitations—Statute of*.

STOCKHOLDERS.

See *Corporations*.
 " *Judgments*, 2, 3.

STREETS. See *Municipal Corporations*, 8, 10.

TAXES.

1. Bonds owned by citizens and residents of the city of Augusta on corporations or individuals resident out of

- the city, are property within the city so as to be subject to taxation by the city authorities, under their general power to assess a tax upon property within the limits of the city. *City Council of Augusta vs. Dunbar*..... 387
2. Under the laws of this State a municipal corporation cannot levy a tax on the bonds issued by the State, even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State itself ought not to be presumed to have done in the absence of clear language so declaring. *Ibid.*
 3. Unless express authority to do so be granted by the Legislature, a municipal corporation has no power to enforce the payment of taxes due it by affixing a penalty of an additional *per centum* for failing to pay promptly when due. *Ibid.*
 4. In order to pass the title to land by a sale by the city marshal of Americus under a *fi. fa.* for city taxes, it is necessary that all the requirements of the city charter should be fully met, and if there be a failure to advertise the sale for thirty days, as required by the charter, the sale is void. *Ansley et al. vs. Wilson, trustee*..... 418
 5. A levy upon land in this State is made by an entry by the levying officer upon the *fi. fa.*, and an entry by a city marshal on a city tax *fi. fa.*, "Levied this *fi. fa.* on a house and lot of the defendant, situated in the eastern part of the city of Americus, to satisfy the within," is not a sufficiently definite entry to give the marshal authority to sell a lot which the defendant happens to own in that part of the city; nor can such an entry by a city marshal be amended after the sale by adding a description sufficient to identify the property intended to be seized. *Ibid.*
 6. The tax called a "license tax," imposed by the City Council of Augusta, by the ordinance of January 5th, 1874, upon insurance companies doing business within the city, is a tax and not a license. *Home Insurance Company vs. City Council of Augusta*..... 530
 7. The City Council of Augusta has power, under the charter of the city, to tax occupations, businesses, etc., and a foreign corporation which has an agency and a

regular agent for the purpose of transacting its usual business within the city, is liable to be taxed. *Ibid.*

8. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property so as to be subject to the *ad valorem* and uniformity rules of taxation prescribed by the Constitution, and therefore a tax on fire insurance companies different from what is imposed on life insurance companies, does not make the tax obnoxious to any constitutional requirement. *Ibid.*
9. Statutes under which exemption from taxation is claimed by corporations, will be strictly construed, and the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the Legislature. *Mayor and Council of Macon vs. Central R. R. and Banking Co.*..... 620
10. The Act of 29th December, 1869, providing that the "stock of the Macon and Western Railroad Company shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do, to-wit: one-half of one per cent. on the amount of the net income," does not confer on the company an exemption of its property within the city of Macon from liability to be taxed by the city authorities as it was before the passage of said Act. *Ibid.*
11. The city of Macon, under its charter, has power to tax all real and personal property within its limits, and there is nothing in the charter of the Macon and Western Railroad Company, or in any statute, that exempts the property of the company thus situated from the right of the city to assess the taxes complained against. *Ibid.*

TENDER.

1. Where one was under a contract to accept and buy a lot of corn from the plaintiff, between the 10th and 20th of April, and on the last day he agreed to extend the time for a tender until the 21st, and on the 21st the plaintiff tendered a lot in the morning, which was not accepted, and again in the evening, which the defendant refused to look at:
Held, that it was not error in the Court to admit evidence of a tender at any time during the day on the 21st, and that it was not error to refuse to permit de-

- defendant to show that plaintiff had made several tenders between the 10th and 20th of April of bad corn, and thus to justify defendant in refusing to look at the second tender on the 21st. *Cunningham vs. Clark & Co.*..... 39
2. On the trial of a motion made under the Relief Act of 1868 to open a judgment rendered in 1867, upon a note dated February 13th, 1861, and due at twelve months, it is not competent for the defendant to prove that in April, 1861, he tendered bank bills in payment of the debt, and that the creditor, or his agent, then refused to accept the bills, or any payment of the note. *Fannin, adm'r, vs. Thomason.*..... 614
3. Where such a motion is filed on the further ground that the creditor had agreed during the war to receive in payment of the debt seven-thirty (7-30) Confederate treasury notes and Georgia bonds, and that movant, by sale of cotton, had procured such notes and bonds and tendered them, which were refused, and it appeared that the movant had kept them until the trial, but collected the interest which accrued on the bonds and notes for his own use :
- Held*, that the collection of the interest by the movant was an appropriation of the bonds and notes for his benefit, and he cannot claim that under said statement of facts the debt is discharged and satisfied. *Ibid.*

TRESPASS.

1. Where a declaration charged that the defendant had, with force and arms and violence, broken the plaintiff's close, and with his feet and one hundred head of cattle, trampled upon and damaged his crop, and the proof showed that defendant was the plaintiff's landlord, that he had undertaken to repair the fence around the close, and in so doing had negligently taken down the fence and exposed the crop to the ingress of cattle ; and there was some evidence going to show that plaintiff had consented to the defendant's going upon the land and making the repairs :
- Held*, there being no count in the declaration for damages from the negligence of the defendant, but only for the trespass with force and arms, that it was error in the Court to charge the jury that if the defendant tore down the plaintiff's fence, and cattle got in and

destroyed the crop, the defendant was liable for the damages. *Roach vs. Trottie*..... 251

2. The effect of the charge was to exclude from the jury the evidence of the plaintiff's consent to the repairs of the fence. If such consent was in fact given, then the defendant was only liable for negligence in repairing the fence, whereas the charge of the Court makes him liable, if he tore down the fence and damage resulted. *Ibid.*

TROVER.

1. It was not error in the Court to refuse to charge the jury that they might take into account the injury to the defendant's iron by General Sherman, and to charge that if they found for the plaintiff they might find the highest proven value of the iron up to the time of the trial. *Central Railroad and Banking Company vs. Atlantic and Gulf Railroad Company*..... 444
2. The verdict of the jury was illegal in finding the highest proven value and any interest for the plaintiff. The measures of damages under our law is, as was charged by the Court, and it is not in the power of the jury to find a verdict for such damages with interest from any date. Unless the plaintiff will remit this verdict for interest, there must be a new trial. *Ibid.*

TRUSTS. See *Administrators and Executors*, 5.

UNITED STATES COURTS.

See *Removal of Cases*.

USURY.

Where two promissory notes before due, were delivered to and accepted by an incorporated body invested with banking privileges, as collateral security for a loan of money made by said corporation to the payees of said notes at a greater rate of interest than seven per cent., the title to the same does not pass, and the maker thereof may plead in bar to a suit thereon in favor of said bank, payment made to the original payees without notice of said assignment. *Caswell vs. Central Railroad and Banking Company*..... 70

VENDOR AND PURCHASER.

See *Equity*, 16-18.

VENUE.

1. An action against a railroad company to recover the excess of a payment for freight beyond what is allowed to be charged by the charter of the company may be brought under the Act of March 4, 1869, in the county from which the articles were shipped, that being the place where the contract for shipment was made, although the payment was made in another county. *Arnold & DuBose vs. Ga. R. R. and Banking Co.*..... 304
2. A bill in equity must show that the defendant against whom substantial relief is prayed is a resident of the county in which it is filed, otherwise the Court has no jurisdiction. *Sims et al. vs. Sims ex'r, et al.*..... 572

VERDICT.

1. Where a distress warrant was sued out for rent, and a counter-affidavit was filed denying that the defendant held the premises from the plaintiff either by lease or rent, and also that he owed the plaintiff any rent, a verdict as follows: "We, the jury, find the issue for the plaintiff," was sufficiently certain, and covered the issue made by the pleadings. *Rickerson vs. Flowers*..... 215
2. Payne sold a parcel of land in the city of Atlanta to Ragsdale, giving a bond for titles describing the land as being two hundred by four hundred and thirty feet, and containing two and one-third acres, more or less. Ragsdale having mislaid the bond, gave Willingham an order to Payne, for Payne to execute to Willingham a deed to the lot, stating it to be about two acres, without giving the boundaries. Under the order Payne executed to Willingham a deed referring to the order and making it a part of the deed, but described the boundaries as being four hundred by four hundred and thirty feet and containing two acres more or less, and reserving a street thirty feet wide running east and west through the centre. Willingham conveyed to Elyea, describing the lot as it was described in Payne's deed to him. On a bill filed by Payne against Willingham and Elyea to reform the deed on the ground of mistake, etc., alleging that he had only sold two and one-third acres to Ragsdale, being the east half of the block which contained four and one-third acres, setting out the foregoing deeds, order, and the bond, (which

had been found,) and praying a decree correcting such mistake in his deed so as to make it a conveyance for the east half of said block, in accordance with the real contract between them, the jury found as follows: "We, the jury, find for complainant, and recommend that the deed be reformed, and that defendant Elyea had sufficient notice:"

- Held*, that the verdict is not sufficiently certain and definite to fix the quantity and identity of the land intended to be conveyed so as to authorize a full, definite and final decree thereon. *Payne, adm'r, vs. Elyea, adm'r, et al.*..... 395
3. If there was ambiguity as to the meaning of the agreement, etc., the verdict of the jury rendered on the application to have a more full decree entered, and for an execution to enforce the same, and the issue made thereon, determined the questions involved, and authorized the order of the Court that was granted. *Gatchius et al. vs. Hodges, adm'r.*..... 603

WAR.

1. Assuming that the Confederate government could, for the purpose of carrying on war against the United States, divest the plaintiff of his property by seizure—which is not made a question here—and assuming that the Court was in error as to the necessity of an Act of Congress to authorize an impressment, and that it was absolutely necessary that full compensation should be made so as to protect the title in an innocent holder, yet, under the facts of this case, as they stand without question on the record, the plaintiff was entitled to a verdict. The defendant was fully informed of the instructions to the agent that the iron was to be shipped to Atlanta to be rolled into plating for ships, and before the iron was in fact taken out of the possession of the plaintiff, contracted with the agent that when taken, the iron, instead of going forward to Atlanta, should be turned over to it. This contract was illegal outside of the instructions of the agent, and this was in the knowledge of the defendant, so that the actual seizure was in fact for the use of the defendant, and not for the Confederate States. The defendant is not an innocent holder, but is in complicity with the agent in his possession of the iron, and that under a contract

entered into before the iron left the possession and custody of the plaintiff. In this view of the case the errors of the Judge, if they were errors, are immaterial, as the verdict must have been for the plaintiff. *Central Railroad and Banking Company vs. Atlantic and Gulf Railroad Company*..... 444

2. It was not error in the Court to refuse to charge the jury that they might take into account the injury to the defendant's iron by General Sherman, and to charge that if they found for the plaintiff they might find the highest proven value of the iron up to the time of the trial. *Ibid.*

WARRANTY.

The evidence for the plaintiff in this case is deficient, in that it fails to show that the mule was afflicted with the disease of which it died at the time of the warranty, and it was no abuse of the discretion of the Judge to refuse to grant a new trial. *McCoy vs. Wily*..... 126

WILLS.

1. Where a testator prior to the emancipation of the slaves, made his will providing for the removal of his slaves to a free State, there to be manumitted, and bequeathing to them certain legacies, the fact that his negroes were emancipated by the results of the war, prior to the death of the testator, and not by the provisions of said will, did not prevent said legacies from vesting. *Thweatt et al. vs. Redd, ex'r, et al.*..... 181
2. A legacy failing either by lapse or because void at law, falls into the residuum and passes to the residuary legatee and not to the next of kin, where there is no contrary intention expressed in the will. *Ibid.*
3. Where there was no ambiguity upon the face of the testator's will, parol evidence is inadmissible to raise a latent ambiguity and then to explain it. *Ibid.*
4. The rule that a lapsed or void legacy of personal property falls into the residuum and passes to the residuary legatee does not apply to a void devise of land, and in such a case the land descends to the heir *Williams, adm'r, vs. Whittle, ex'r*..... 523
5. The testator, by his will, authorized his executors to sell his property upon such terms as to notice or credit as they might in their sound discretion deem best:

Held, that the executors had the power to sell the property without an order from the Ordinary either for cash or credit, and upon such notice as they in their sound discretion might deem best; but in all other respects they were bound to comply with the law regulating such sales. *Jackson et al., ex'rs, et al., vs. Williams et al.*..... 553

WITNESS.

1. It was not error in the Judge on the trial to permit the statement of the witness Sibley that "he had no idea that complainant was a stockholder," taken in connection with the witness' other statements; this is only another mode of stating the recollection of the witness that he was not a stockholder. *Frazer vs. Sibley et al.* 96
2. On the trial of a bill by a surviving partner against the representatives of a deceased partner for an account and settlement of the partnership affairs, the survivor is not a competent witness to testify in his own favor; nor does it alter the case that a portion of the matter in dispute is a Confederate transaction and involves the value of Confederate money, except that the survivor may testify as to the value of said money. *Graham et al. vs. Howell et al., ex'rs*..... 203
3. On the trial of such a case, the complainant Payne is a competent witness on the issue of a mistake in his deed to defendant Willingham, although the co-defendant Elyea, the vendee of Willingham, had died since the filing of the bill, and his representative is made a party. *Payne, adm'r, vs. Elyea, adm'r, et al.* 395
4. We think Mrs. Rose was a competent witness in this case in the issue before the jury, to-wit: the *mesne* profits, even though Henderson was dead. *Rose vs. West*..... 474

YEAR'S SUPPORT.

Where a lot of land which was set apart for the twelve month's support of the family of deceased was sold under the order of the Ordinary, and the proceeds thereof applied to such support, the heirs-at-law cannot recover the same on account of want of authority in the Ordinary to direct such sale. *Miller et al. vs. Defoor*.... 566

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